① Supreme Court, U.S.
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No. ___ OFFICE OF THE CLERK

In The

Supreme Court of the United States

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CRECENSION ACUNA, ET AL.,
Petitioners,
v.

BROWN & ROOT, INC., ET AL.,
Respondents.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

The petition presents the following questions:

I. Petitioners filed suit against Respondents in Texas state court to recover damages arising from prolonged exposure to materials propagated during uranium mining and milling operations. The case was removed to federal district court, relying upon the Price-Anderson Act, 42 U.S.C. § 2210, as basis for subject matter jurisdiction. Are damages contracted from long term exposure to products spawned from uranium mining and milling operations a "public liability action", that confer removal jurisdiction under the Price-Anderson Act?

II. As result of the prolonged exposure to uranium mining and milling products, Petitioners contracted various diseases, including pneumoconiosis (silicosis). Even after producing affidavits from qualified experts that unequivocally validated causation, the federal district court resolved that insufficient to even confirm *prima facie* causation. Did Petitioners' establish *prima facie* causation?

III. The federal district court dismissed Petitioners' claims against Respondents, with prejudice. Does the removal to federal district court and ultimate dismissal with prejudice violate the Fifth and Fourteenth Amendments of the United States Constitution which guarantees access to State courts, equal protection of the laws, and due process?

LIST OF PARTIES

The Parties to the proceeding below are the following:

1. Petitioners: Crecension Acuna, and 906 additional individuals (complete list of Petitioners is contained in Appendix, p. A-34).

2. Respondents: Brown & Root, Inc., Halliburton Company, Kellog Brown & Root, Inc., Chevron USA Inc., Chevron Resources Company, Chevron Industries, Conoco, Inc., Continental Oil Company, Exxon Corporation, Exxon Coal & Minerals Company, Rio Grande Resources Corporation, General Atomics, General Atomics Corp., Atlantic Richfield Company, Anaconda Company, Vastar Resources, Intercontinental Energy Corporation, IEC Corporation

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, in its Cause No. 98-51073, rendered January 11, 2000.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit and its opinion, reported at 200 F.3d 335 (5th Cir. 2000), are reproduced in the Appendix to this petition, p. A-1. The order of dismissal from the United States District Court, Western District of Texas, and its opinion are reproduced in the Appendix to this petition, p. A-15.

STATEMENT OF JURISDICTION

The judgment and opinion which this Court is asked to review were rendered on January 11, 2000 by the United States Court of Appeals for the Fifth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the Case

This is a civil action brought by 907 Petitioners in Texas state court, to recover damages for debilitating personal injuries to Texas residents, caused by long-term exposure to radioactive and other materials released during uranium mining and milling activities. The order of dismissal was entered by the United States District Court for the Western District of Texas (Appendix, p. A-15). That dismissal was affirmed by the United States Court of Appeals for the Fifth Circuit. (Appendix, p. A-1).

Facts

Because they lived and worked around Respondents' uranium mining and milling operations for extended periods of time, some as long as 30-40 years, Petitioners now suffer from appalling, painful and often life threatening diseases such as pneumoconiosis (silicosis), dysfunctional cellular immune response, pulmonary injuries, porphyria and kidney disease. (Appendix, pp. A-88, A-129, A-150, A-154, A-159). As a result of this exposure and resulting damages, Petitioners filed suit in Texas state court, asserting causes of action under state law.

Notwithstanding, the case was removed to federal district court in San Antonio, based upon spurious assertions that damages sustained from long-term exposures to uranium mining and milling operations was a "public liability action", and therefore removable under the Price-Anderson Act. (Appendix, p. A-34). Petitioners timely filed their motion to remand, complaining of the lack of subject matter jurisdiction. (Appendix, p. A-71). After denial of the motion to remand, a Magistrate Judge entered an extensive "scheduling" order that required Petitioners to produce expert affidavits, as proof of *prima facie* causation.[1] (Appendix, p. A-76).

After extensive testing and medical examinations, comprehensive affidavits were submitted for each Petitioner. (Appendix, pp. A-88,[2] A-129, A-150, A-154, A-159). Regardless, the Magistrate Judge recommended dismissal of the entire lawsuit. (Appendix, p. A-162). Petitioners filed objections to and appeal of the Magistrate Judge's recommendation to dismiss. (Appendix, p. A-186). Despite the lack of subject matter jurisdiction and in the face of overwhelming evidence that substantiated causation, the federal district court summarily dismissed Petitioners' causes of action with prejudice. (Appendix, p. A-15). That dismissal was affirmed by the Fifth Circuit. (Appendix, p. A-1).

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[1] Prior to any disclosure or discovery, the scheduling order also required: (1) identification of the precise chemicals and other compounds to which each plaintiff was exposed; (2) quantification of precise times of exposure; (3) calculation of explicit levels of exposures; and (4) marshalling all evidence validating Respondents' egregious activities, events and conduct. (Appendix, pp. A-76, A-122). This absolved Respondents from responsibility to produce necessary documents through required disclosure or discovery that would establish negligence and affirm causation.

[2] Dr. Smith prepared an individual affidavit for each of the 907 Petitioners. Although each affidavit is included with the record submitted with the appeal to the Fifth Circuit, only a representative sample is included in this Appendix.

REASONS FOR GRANTING THE WRIT

Even though removal jurisdiction was asserted under shroud of the Price-Anderson Act, no such subject matter jurisdiction exists. Explicitly, this Court has determined Price-Anderson Act would not apply to the uranium mining and milling operations that were the source of contamination, because Respondents had no indemnification agreement with the federal government.[3] In addition to lack of an indemnification agreement, as acknowledged by other federal courts, Price-Anderson does not confer subject matter jurisdiction because: (1) there was no "occurrence" (no unintended escape or release of nuclear energy);[4] (2) there was no nuclear incident;[5] and (3) the mining and milling operations were not licensed by the Nuclear Regulatory Commission (NRC).[6]

Moreover, the expert affidavits substantiated *prima facie* causation. In particular, the affidavit of Dr. Glen Baker, a medical doctor, board certified in internal medicine and pulmonology, identified specific Petitioners that now suffer from pneumoconiosis, because of their exposure to Respondents' uranium mining and associated activities. Based upon confirmatory X-rays, Dr. Baker cited specific scientific literature which corroborated pneumoconiosis in at least twenty-seven (27) individual Petitioners, which were in fact caused by exposure to "inhaled particles of silica and other micro particles that are consistent with the methods used in uranium surface mining operations." (Appendix, p. A-156). Similarly, Dr. Charles Smith and the other experts also identified specific illnesses caused by exposure to uranium mining and milling operations. (Appendix, pp. A-88, A-129, A-150, A-159). Since the testing, cited scientific literature and affidavits absolutely confirmed *prima facie* causation, dismissal was not justified.

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[3] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-52 & n.12 (1984).

[4] *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 335 (D.N.J. 1998); *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 832 (S.D.Ohio 1995).

[5] *Id.*

[6] 42 U.S.C. § 2220(b) (1995); TEXAS HEALTH & SAFETY CODE ANN. § 401.011 *et seq.* (Vernon 1992).

Due Process

United States citizens have a fundamental right to pursue claims in state courts. These rights arise under the Petition Clause of the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Petition Clause encompasses not only the right of access to the legislative branch, but also the right of access to the courts.[7] The same ideals of liberty and democracy that resulted in the freedoms to speak, publish and assemble also inspired the Petition Clause and are inseparable First Amendment rights.[8] While the text of the First Amendment refers to Congress, the First Amendment also applies to the states through the Due

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[7] *California Motor Transport Co. v. Trucking, Unlimited,* 404 U.S. 508, 510 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741 (1983).

[8] *McDonald v. Smith,* 472 U.S. 479, 485 (1985).

Process Clause of the Fourteenth Amendment.[9] Thus, the right of access to state courts derives both from the First Amendment Petition Clause and from the Fourteenth Amendment itself.[10]

The right to due process reflects a fundamental value in our American constitutional system.[11] These due process rights are inherent in both the Fifth and Fourteenth Amendments. Access to the state courts is the foundation of the rule of law. Prohibiting Petitioners from pursuing their claims in state court, by improperly imposing federal subject matter jurisdiction was a clear violation of due process.

Further, the burden placed upon Petitioners by the federal district court to present their entire case without benefit of discovery, was both onerous and improper. Such burden was a clear violation of the due process rights guaranteed by the Fifth Amendment.

Uranium mining is not indemnified in Price-Anderson

Removal was based solely upon Respondents' assertion that subject matter (removal) jurisdiction was provided by Price-Anderson. (Appendix, p. A-34). But, absent indemnification, there is no such allowance:

> . . . the Price-Anderson Act, an amendment to the Atomic Energy Act . . . established an indemnification scheme under which operators of licensed nuclear facilities could be required to obtain up to $60 million in private financial protection against such suits. The government would then provide indemnification, for the next $500 million of liability, and the resulting

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[9] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1966).

[10] *See Bieregu v. Reno*, 59 F.3d 1445, 1453-54 (3rd Cir. 1995).

[11] *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

> $560 million would be the limit of liability for any one nuclear incident.[12]

As review of the history of Price-Anderson confirms, the NRC does not now require, nor has it ever required, uranium mine owners or operators to maintain financial protection. The government only provides indemnification to those required to maintain financial protection, and Price-Anderson applies only to those indemnified.[13] Respondents did not have an indemnity agreement with the federal government, were not required to maintain Price-Anderson's financial protection, and therefore were not beneficiaries of the indemnification protection provided by Price-Anderson.

In *Silkwood*, a diversity case, the issue was whether federal regulation of the nuclear energy industry under Price-Anderson preempted an award of punitive damages under state law. After tracing the long history of the act, this Court determined Price-Anderson did not apply because the "NRC did not require plutonium processing plants to maintain financial protection." Specifically, in *Silkwood* this Court explained that "the Price-Anderson Act did not apply" because at the time of the "escape" which formed the basis of that lawsuit, the (Kerr-McGee) plutonium facility was not required to maintain financial protection and not subject to an indemnification agreement.[14] Even in dissent, Mr. Justice Powell admitted unequivocally that "[Price-Anderson] did not apply at all to the Kerr-McGee plant at the time of this incident."[15] Correspondingly, the uranium mining and milling activities here, like the plutonium processing plant in *Silkwood*, were not subject to an indemnification agreement nor required by the NRC to maintain financial protection.

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[12] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 239, 251-52, 251 n.12 (1984).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 279 (Powell, J., dissenting).

Consequently, since Price-Anderson does not apply then the removal provisions added in the 1988 Amendments to the Price-Anderson Act, would similarly not apply.

Uranium mining is not a "public liability action"

Some circuits have applied Price-Anderson to confer subject matter jurisdiction, but only for individuals exposed to radiation unintentionally released from nuclear power plants that were required to provide financial protection and that had an indemnification agreement with the NRC. Under those facts, Price-Anderson would control because there was a "public liability action": (1) an "occurrence" (unintended release of nuclear energy from a nuclear power plant); (2) a "nuclear incident"; and (3) the facility had an indemnification agreement with the NRC.[16] But, none of those facts are present here.

Only two federal courts have addressed the specific issue in this case, whether or not damages from long-term exposure to products spawned from mining and milling of radioactive materials constitute a "public liability action" governed by the Price-Anderson Act, which confers removal jurisdiction. A federal district court in New Jersey, relying upon *Silkwood*, concluded that there could be no "public liability action," and therefore no pre-emptive federal subject matter jurisdiction under Price-Anderson, absent an indemnification agreement with the federal government.[17]

In contrast, a federal district court in the Northern District of Illinois determined that Price-Anderson would apply, even without an indemnification agreement. However, recognizing that *Gilberg* "presents a thoughtful and exhaustive examination of the statute . . . ," the Illinois court certified that question to the United States Court of Appeals for the Seventh Circuit.[18]

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[16] *In re TMI II*, 940 F.2d 832, 854 (3rd Cir. 1991).

[17] *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 335 (D.N.J. 1998).

Uranium mining is not a nuclear incident

Notwithstanding the indemnification requirement for applicability of Price-Anderson, the removal provisions in the 1988 Amendments to the Price-Anderson Act were never intended to provide federal subject matter jurisdiction for damages resulting from uranium mining and milling operations. Even after those amendments, before an "occurrence" qualifies as a "nuclear incident," the escape or release of nuclear material must be unintended and occur in connection with an indemnified activity.[19]

Nuclear incident requires an occurrence

The explicit words of the Atomic Energy Act define a "nuclear incident" as "any occurrence, including an extraordinary nuclear occurrence" causing bodily injury.[20] Of particular importance is the term "occurrence," because if Petitioners' claims are not an "occurrence," then this is not a "nuclear incident" and the preemptive subject matter jurisdiction provisions of Price-Anderson cannot apply.

> To summarize, preemption under Price-Anderson sweeps broadly to include any claim alleging "public liability," that is, "any legal liability arising out of or resulting from a nuclear incident." § 2014(w). **For there to be a nuclear incident, however, there must be an "occurrence,"** and an occurrence under the Act can only be an "event . . . [at] 'the location' of 'the contract

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[18] *Carey v. Kerr-McGee Chemical LLC*, No. 96-C8583, 1999 WL 966484 (N.D. Ill. Sept. 30, 1999).

[19] *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 832 (S.D. Ohio 1995).

[20] 42 U.S.C. § 2014(q) (1995).

> location' as defined in the applicable . . . indemnity agreement, entered into pursuant to section 2210." § 2014(j) & (q). **No such agreement covers the [mining and milling operations]. Therefore, no event alleged by plaintiff can constitute an "occurrence." Plaintiff's action, therefore, is not "one based on 'any legal liability' of 'any person who may be liable on account of a nuclear incident,' "** *TMI II,* 940 F.2d at 854, **and cannot be removed pursuant to 42 U.S.C. § 2210(n)(2).**[21]

Considered in isolation, "occurrence" could be understood to include any event or happening. However, fundamental principles of statutory construction dictate that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.[22] "Occurrence," therefore, must be read in accordance with the clause "including an extraordinary nuclear occurrence."[23]

Extraordinary nuclear occurrence ("ENO") is statutorily defined as "any event causing a discharge or dispersal of . . . [nuclear material] . . . which the [NRC] . . . determines to be substantial . . . and . . . which the [NRC] . . . determines has resulted or will result in substantial damages to persons offsite. . . . " Moreover, "offsite" means "away from 'the location' or 'the contract location' as *defined in the applicable Nuclear Regulatory Commission . . . indemnity agreement* . . . "[24] Thus, an indemnity agreement is clearly a predicate to an ENO.

Another rule of interpretation requires that identical words used in different parts of the same statute are intended to have the same meaning.[25] Thus, because of proximity to and interrelationship between *"occurrence"* and "extraordinary nuclear *occurrence,"* the two terms were meant to have similar meanings. "Occurrence" in the definition of ENO is predicated on an indemnity agreement with the NRC; thus, as a matter of statutory construction, the "occurrence" which underlies a "nuclear incident" was intended to be restricted to events at "the location" or "the contract location," as that term is defined in an indemnity agreement.[26]

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[21] *Gilberg,* 24 F.Supp.2d at 345-46 (emphasis supplied).

[22] *Deal v. United States,* 508 U.S. 129, 132 (1994).

[23] 42 U.S.C. § 2014(q) (1995).

[24] 42 U.S.C. § 2014(j) (1995).

[25] *Sullivan v. Stroop,* 496 U.S. 478, 484 (1990).

An indemnity agreement, therefore, is also a predicate for an "occurrence" and consequently a "nuclear incident" under Price-Anderson. Such interpretation, besides being founded upon well-established principles of statutory construction, is also consistent with Price-Anderson's history and statutory framework. The Act was intended to cover nuclear accidents taking place on facilities indemnified under its liability scheme, not uranium mining facilities. Accordingly, because Respondents' uranium mining activities did not have an indemnification agreement with the NRC, there was no "occurrence," no "nuclear incidents," and therefore no applicability of Price-Anderson.[27]

Nuclear incident requires unintended escape or release of nuclear energy

One of the few courts that have dealt directly with application of Price-Anderson to removal of state claims for damages from other than nuclear power plants is the district court of the Southern District of Ohio. That court determined that a "nuclear incident" cannot occur when there is no unintended escape or release of nuclear energy from a nuclear facility. Therefore, Price-Anderson cannot apply here because the uranium mining activities were conducted as intended, without an unintended escape or release.[28]

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[26] *Gilberg,* 24 F.Supp.2d at 332.

[27] *Gilberg,* 24 F.Supp.2d at 335; *In re Cincinnati Radiation Litig.,* 874 F.Supp. 796, 832 (S.D. Ohio 1995).

Uranium mining was never included in Price-Anderson

Price-Anderson was never intended to apply to uranium mining activities, based upon the belief that uranium mining did not pose the grave dangers to the public that nuclear reactors posed. Affirmation that Congress never intended Price-Anderson to cover uranium mining activities is found in review of the legislative history of the 1957 Price-Anderson Act, as well as the Atomic Energy Act, which never even mentioned uranium mining.

Atomic Energy Act of 1946

The history behind the Price-Anderson Act begins with the passage of the Atomic Energy Act of 1946. Then, Congress contemplated that the development of nuclear power would be a governmental monopoly. However, both technological and political developments in the decade that followed demanded a wholesale revision of federal atomic policy. Thus, Congress amended and recodified its policy in the Atomic Energy Act of 1954.[29]

Atomic Energy Act of 1954

Congress passed the Atomic Energy Act of 1954 to encourage the entrance of private industry into the atomic energy program and speed the further development of peaceful uses of atomic energy. Under strict federal regulation and licensing by the Atomic Energy Commission, the private sector was allowed to build and construct nuclear power reactors for energy production.[30]

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[28] *In re Cincinnati Radiation Litig.*, 874 F.Supp. at 832.

[29] *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978).

[30] *Id.*

While this act provided for regulation of nuclear power plant construction and operation, it had no provisions relating directly to uranium mining.

Although the Atomic Energy Commission offered incentives to encourage private investment, "there remained in the path of the private nuclear power industry various problems – the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle." Private industry and the Atomic Energy Commission were confident that such a disaster would not occur, but the danger remained "and the potential liability dwarfed the ability of the insurance companies to absorb the risk."[31] Indeed, the private sector informed Congress that they would be forced to withdraw from nuclear power unless their potential liability could somehow be limited.[32]

Price-Anderson Act of 1957

Congress responded to the private sector's concerns of unlimited liability by passing the Price-Anderson Act in 1957; also known as the Atomic Energy Damages Act. By limiting the aggregate liability for a single nuclear incident to $500 million plus the amount of liability insurance available on the private market, Price-Anderson had the dual purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry."[33] In effect, the private nuclear power plant industry was required to purchase the maximum amount of liability insurance on the open market, and if damages resulting from a nuclear power plant disaster exceeded that amount, the Federal Government would indemnify the licensee up to a maximum of $500 million. Again, the

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[31] *Id.* at 64.

[32] *Id.*

[33] 42 U.S.C. § 2012(i) (1995).

1957 Price-Anderson Act did not mention uranium mining.[34]

Under the Act, those desiring a license for the construction or operation of nuclear power facilities were required to enter into an indemnification agreement with the Atomic Energy Commission and maintain the appropriate amount of insurance.[35] However, while the Atomic Energy Commission was authorized to license the production and possession of nuclear materials, Price-Anderson did not require those material licensees to maintain insurance nor enter into an indemnification agreement.[36] Instead, the Act gave the Commission discretion to require financial protection and indemnify those contractors it determined to be engaged in activities that involved the risk of a substantial nuclear accident.[37] Uranium mining activities, moreover, were not required by the Commission to comply with Price-Anderson and did not have to maintain insurance nor agree to indemnification.

Another significant feature of the Price-Anderson Act of 1957 was the limited involvement of the federal courts. While the Act did identify the realm of compensable claims, it did not create a federal cause of action nor provide a federal forum for the resolution of claims. Instead, liability and the measure of damages arising from nuclear incidents was to be determined by state law, and jurisdiction to decide those claims remained in the province of the state courts.[38]

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[34] *Duke Power Co.*, 438 U.S. at 64-65.

[35] 42 U.S.C. § 2210(c) (1995).

[36] Price-Anderson Act, sec. 4, § 170(a), reprinted in 1957 U.S.C.C.A.N. at 630.

[37] 42 U.S.C. § 2210(d) (1995).

[38] *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 335 (D.N.J. 1998); *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 492-94 (3rd Cir. 1986).

1966 Amendments

Congressional concern that two different victims of a serious nuclear incident might be subjected to different substantive and procedural laws by reason of an "invisible state boundary" led to the 1966 Amendments of the Act. At that time, state tort law dealing with liability for nuclear accidents was unsettled, and there was no assurances that all state courts would impose a rule of strict liability in the event of a serious nuclear disaster. Without strict liability, an injured plaintiff unable to prove negligence would not be compensated.[39]

Thus, the 1966 Amendments provided for a waiver of defenses in the event of an *extraordinary nuclear occurrence* ("ENO"). In addition, the amendments provided for emergency assistance payments, non-waiver of defenses in other nuclear incidents, and consolidation of suits after an *extraordinary nuclear occurrence*. Of particular importance, the "consolidation of suits" provision is the precursor to the current removal statute.

Another significant aspect of the 1966 Amendment is that ordinary "nuclear incidents" continued to be handled by state courts in accordance with state tort law. Federal courts, therefore, could only intervene in the event of an extraordinary nuclear occurrence, or in the event of a non-extraordinary occurrence when it appeared that the federal indemnity pot of $500 million would be exceeded.[40] Once again, the motivation for the 1966 Amendments was the extreme dangers and liabilities of a nuclear power plant disaster. Still, uranium mining was not mentioned nor considered.

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[39] *Gilberg*, 24 F.Supp.2d at 336-37 (quoting S. Rep. No. 89-1605 reprinted in 1966 U.S.C.C.A.N. at 3208).

[40] *Id*. at 338.

1975 Amendments

In 1975, Congress once again amended and extended the Price-Anderson Act by revising the federal-private sector indemnity scheme. Still, this amendment did not mention uranium mining. Nuclear power, at that point in time, had grown up and was a profitable operation. Thus, operators of large nuclear power plants were required by the 1975 Amendments to contribute to an indemnity fund, while the federal government diminished its role. As of 1978, for example, in the event of a nuclear incident causing $560 million or more in damages, $315 million would be paid from contributions by licensees of the 63 private operating nuclear power plants. Another $140 million would be paid by private insurance maintained by the licensee, and the remaining $105 million would be borne by the Federal Government.[41]

Three Mile Island (TMI)

The first real test of the Price-Anderson statutory scheme occurred four years later at Three Mile Island ("TMI"), a nuclear power facility near Harrisburg, Pennsylvania. On March 28, 1979, the TMI nuclear power facility released radiation into the atmosphere, injuring thousands of area residents and businesses within a twenty-five mile radius of the facility.[42]

The TMI release generated in excess of 150 separate cases, filed in various state and federal courts.[43] Even with this phenomenal release of radiation directly into the atmosphere, the Nuclear Regulatory Commission (successor to the Atomic Energy Commission) determined that the TMI incident did not constitute an "extraordinary nuclear occurrence," and therefore was not protected by the Price-Anderson Act. Federal courts, therefore, did not have subject matter jurisdiction over TMI related cases under the Price-Anderson Act.[44]

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[41] *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 57, 67 (1978).

[42] *In re TMI III*, 67 F.3d 1103, 1105 (3rd Cir. 1995).

[43] *Gilberg*, 24 F.Supp.2d at 338.

1988 Amendments

When Congress considered whether to re-authorize the Price-Anderson Act in 1988, TMI cases had cost approximately $50 million, of which 85% was paid for claims. At the state court level, there was no clear method for handling the influx of cases nor a uniform standard for compensating injured plaintiffs. Moreover, two thousand additional personal injury cases were still winding their way through the judicial system nearly a decade after the incident.[45]

It was the inefficiency of having TMI claims determined and litigated separately by different courts in different states which led Congress to enact the 1988 Amendments to the Act. Indeed, the 1988 Amendments made two jurisdictional changes to Price-Anderson designed to prevent complications and delays in future litigation.

First, the amendments expressly created a federal cause of action under the Act for "public liability actions" arising out of a nuclear incident, which effectively preempted any state cause of action previously available.[46] However, even that new federal cause of action did not expand the scope of claims compensable under the Act.[47]

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[44] *Kiick v. Metro. Edison Co.*, 784 F.2d 490, 495 (3rd Cir. 1986).

[45] Price-Anderson Amendment Act of 1988, S.Rep. 100-70, 100th Cong., 2nd Sess., reprinted in 1988 U.S.C.C.A.N. 1424, 1428.

[46] *In re TMI II*, 940 F.2d 832, 857 (3rd Cir. 1991).

[47] *Gilberg*, 24 F.Supp.2d at 339.

Second and more importantly, the 1988 Amendments substituted the phrase "nuclear incident" for "extraordinary nuclear occurrence" in the Act's jurisdictional provision.[48] This jurisdictional expansion was retroactively effective, and allowed all the previously scattered TMI cases, which did not qualify as ENO but did qualify as a "nuclear incident," to be removed to and consolidated in the Middle District of Pennsylvania.[49]

Once again, the legislative history explains the rationale for this change:

> Under current law, only claims arising from an extraordinary nuclear occurrence may be consolidated in federal court. In litigation following the Three-Mile Island accident, the U.S. Court of Appeals for the Third Circuit held that federal courts do not have subject matter jurisdiction of claims arising out of a non-extraordinary nuclear occurrence.[50] The bill expands existing law to allow for the consolidation of claims arising out of any nuclear incident in federal district court.
>
> The experience with claims following the TMI accident demonstrate the advantages of the ability to consolidate claims after the nuclear incident. Attorneys representing both plaintiffs and defendants in the TMI litigation testified before the Committee that the ability to consolidate cases in federal court would greatly benefit the process for determining compensation for claimants. The TMI accident, which was not an extraordinary nuclear occurrence, has resulted

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[48] Price-Anderson Amendments Act of 1988, Pub.L. 100-408, sec. 11(b), § 11(hh), 102 Stat. 1066, 1076 (codified at 42 U.S.C.A. § 2014(hh)).

[49] *In re TMI III*, 67 F.3d 1103, 1105 (3rd Cir. 1995).

[50] *Stibitz v. GPU*, 746 F.2d 993 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 1187 (1985).

> in over 150 separate cases against TMI defendants, with over 3,000 claimants in various state and federal courts. Many of the issues in these cases are similar. The availability of the provisions for consolidation of claims in the event of any nuclear incident, not just an extraordinary nuclear incident, would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation.[51]

Certainly, the Price-Anderson Act today provides federal preemptive subject matter jurisdiction over "any public liability action arising out of or resulting from a nuclear incident."[52] But, even this expanded inclusion of any "nuclear incident," was never intended to cover uranium mining and in fact does not apply to uranium mining activities.[53]

Such application is evident from the Act's legislative history, discussed above, which never mentioned uranium mining, and also from the interpretation of the courts. Instead, Congress intended to shelter the nuclear power industry from the serious risks and problems associated with production of nuclear power, including the construction and operation of nuclear power plants. At any time, Congress could have, but chose not to, include uranium mining in the Act's coverage. Indeed, neither the Atomic Energy Act, the Price-Anderson Act, nor any of its amendments evidence a change from the original policy of leaving jurisdiction over uranium mining to the states.

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[51] Price-Anderson Amendment Act of 1988, S.Rep. 100-218, 100th Cong., 2nd Sess., reprinted in 1988 U.S.C.C.A.N. 1476, 1488.

[52] 42 U.S.C. § 2210(n)(2) (1995).

[53] *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 832 (S.D. Ohio 1995).

The NRC ceded all regulatory authority to Texas

Under the "agreement with states program," any state that enters into an agreement with the NRC, discontinues the NRC's regulatory authority under the Atomic Energy Act for the following materials: byproduct materials, source materials, and special nuclear material.

> During the duration of such an agreement, it is recognized that the state has authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.[54]

Because Texas is an agreement state, the NRC relinquished its regulatory authority to Texas over the same uranium mining and milling operations, including byproduct and source material, that are the basis of this lawsuit.[55] Accordingly, Petitioners' claims for damages from exposure to radioactive materials naturally released from the byproduct and source material during uranium mining and milling operations is simply not an action under the Atomic Energy Act. Because Price-Anderson is an amendment to the Atomic Energy Act, Price-Anderson also does not apply, no subject matter jurisdiction exists, and Petitioners' claims were not properly removable to federal court.

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[54] " . . . The Commission is authorized to enter into agreements with the governor of any state providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII, of this division, and Section 2201 of this Title, with respect to any one or more of the following materials within the state:

1. byproduct materials as defined in Section 2014(e)(1) of this Title;
2. byproduct materials as defined in Section 2014(e)(2) of this Title;
3. source materials; and
4. special nuclear materials in quantities not sufficient to form a critical mass."

42 U.S.C. § 2021(b) (1995).

[55] Texas Health & Safety Code Ann., § 401.011 *et seq.* (Vernon 1992); Tex. Nat. Res. Code Ann., § 131.001 *et seq.* (Vernon 1993).

Since Texas is an agreement state, sections 2071, 2093 and 2011, which pertain to byproduct materials, source materials, and special nuclear material, are not licensed or controlled by the NRC.[56] Instead, by agreement the licenses are provided by the State of Texas and no license was issued to Respondents under any other section or provision of the Atomic Energy Act. Clearly, absent applicability of the licensing requirements of the Atomic Energy Act, the indemnification and limitation of liability provisions of the Price-Anderson amendments to the Atomic Energy Act do not apply and no federal subject matter jurisdiction exists.

Texas Radiation Control Agency

Under § 401.011(a) & (b) of the Texas Health and Safety Code, the Texas Radiation Control Agency has *jurisdiction* to regulate and *license*:

1. disposal of radioactive substances, and
2. the recovery and processing of source material.

"Radioactive substances" are defined under § 401.003(19) to include (a) byproduct material; (b) naturally occurring radioactive material wastes, excluding oil and gas wastes; (c) radioactive material; (d) radioactive wastes; (e) source material; (f) sources of radiation; and (g) special nuclear material. Correspondingly, "Source material," under subsection 22 means: (a) uranium, thorium, or other material that the governor by order declares to be source material after the federal commission has determined the material to be source material; or (b) that contains one or more of the materials listed in subsection (a) to the degree of concentration that the governor by order declares to be source material after the federal commission has determined the material to be a degree of concentration to be source material. "Byproduct," under subsection 3 means: (a) a radioactive material, other than special nuclear material, that is produced in or made radioactive by exposure to radiation incident to the process of producing or using special nuclear material; and (b) tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discreet surface wastes resulting from uranium solution extraction processes, and other tailings having similar and radiological characteristics. Since Texas is an agreement state, Price-Anderson does not apply to this case.

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[56] 42 U.S.C. § 2210(a) (1995).

Prima facie causation was established

It is important to note that the federal district court did not conduct a "gate keeper" analysis, and made no determination that Petitioners' experts were not qualified. Instead, the court simply refused to recognize the contents of the affidavits as sufficient to establish *prima facie* causation.

Under the threshold established by the Fifth Circuit, the facts required to sustain a plaintiff's burden of causation in toxic tort cases have been confined to "scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities."[57] More precisely, Fifth Circuit law mandates plaintiffs prove both general and specific causation.[58] Typically, when uranium exposure puts an identifiable population group at increased risk, causation exists merely when a member of that group develops a biological condition consistent with the hazard. In fact, such exposure and illness results in a presumption of causation "absent persuasive proof to the contrary offered by the defendant."[59]

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[57] *Allen v. Pennsylvania Eng. Corp.*, 102 F.3d 194, 199 (5th Cir. 1996).

[58] *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 313 (5th Cir. 1988), *modified*, 884 F.2d 166 (5th Cir. 1989).

Before providing the affidavit evidence, Petitioners' experts: (1) conducted extensive soil sampling, (2) interviewed appellants, (3) tested and examined Petitioners, (4) reviewed medical records and test results, and (5) analyzed relevant scientific literature. Only then were the experts able to affix causation for the illnesses suffered by Petitioners and prepare necessary affidavits.

The court requirements imposed were never designed nor intended to be a "gate keeper" review of ultimate qualification of experts or admissibility of testimony. Instead, Petitioners were only required to establish *prima facie* causation, and have done so with qualified experts, whose opinions were rendered after examination of Petitioners, review of testing materials, and pertinent, competent scientific literature. Even under a "gate keeper" analysis, Petitioners' experts and testimony are more than sufficient.

Dr. Glen Baker, M.D.

Dr. Baker is a medical doctor, board certified in internal medicine and pulmonology, a renowned expert in diagnosis of pulmonary diseases, including asbestosis, pneumoconiosis and other fibrotic conditions of the lung. In his affidavit, Dr. Baker identified Petitioners that suffer from pneumoconiosis, because of their exposure to defendants' uranium mining and associated activities. (Appendix, pp. A-155-56).

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[59] *Allen v. United States*, 588 F.Supp. 247, 415 (C.D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

Dr. Charles Smith, M.D.

Dr. Smith is a licensed medical doctor that rendered causation opinions based upon examinations, scientific data, tests, medical authorities and other information available to him. In his affidavits, Dr. Smith specified: (a) tests run on Petitioners, (b) the purpose and results of each test, (c) individuals with direct and indirect exposure to uranium mining and milling operations, (d) the toxic proclivity of the materials to which individuals were exposed, (e) the minimum toxic dosages of the chemicals required for the particular illnesses, (f) the minimum toxic dosages to which Petitioners were exposed, (g) the durations of exposure, and (h) description of each disease producing sequentially from exposure. Dr. Smith's opinions, based upon reasonable medical probability, were that appellants' illnesses were caused by exposure to the products produced by Respondents' uranium mining and milling operations. (Appendix, pp. A-88, A-129).

Dr. Kenneth Ratzjczak, M.D.

Dr. Ratzjczak is a licensed medical doctor and board certified radiologist, with a medical sub-specialty in "B"-Reading evaluation. Based upon patient histories and radiographic confirmatory data, Dr. Ratzjczak diagnosed numerous Petitioners with pulmonary injuries, including pneumoconiosis, a fibrotic lung condition. Dr. Ratzjczak also explained that these illnesses were caused by exposure to chemicals and other toxic substances present in defendants' uranium mining and milling operations. (Appendix, p. A-150).

Dr. Aristo Vojdani, Ph.D.

Dr. Vojdani is a recognized expert in immunology and microbiology. Based upon Petitioners' laboratory samples, Dr. Vojdani tested these samples for cellular abnormalities and immune system dysfunctions. Dr.

Vojdani diagnosed some Petitioners with abnormalities and altered immune system functioning, caused by exposure to toxic substances from the uranium mining operations. (Appendix, p. A-159).

The expert affidavits and technical articles clearly explained the source and type of contaminants, minimum dosages and exposures required for particular illnesses, durations of Petitioners' exposure and dosage, specification of chemicals and toxic substances to which Petitioners were exposed, and the illnesses which resulted from the exposure and dosages. (Appendix, pp. A-88, A-129, A-150, A-154, A-159). Those affidavits also detailed the scientific literature relied upon as authentication of causation. As example, the affidavits confirmed, based upon reasonable medical probability, that due to the uranium mining and milling operations, Petitioners suffered from illnesses which included pneumoconiosis and dysfunctional cellular immune response. Those affidavits conclusively established both general and specific causation. (Appendix, pp. A-88, A-129, A-150, A-154, A-159).

The affidavits clearly delineated the *particular* illnesses and conditions attributable to each Petitioners' exposure to the mining and milling operations, Petitioners' dosages and exposures, and the minimum dosages and exposures required for the illnesses. There can be no dispute that Petitioners did in fact establish *prima facie* causation.[60]

General causation

General causation means only that exposure to the chemicals and toxic substances from the mining and milling operations could cause the illnesses identified by these Petitioners.[61] Here, general causation was established by the cited scientific literature, which clearly delineated that the types of injuries suffered by these Petitioners are caused by exposure to the radiation and related products released during Respondents' mining and milling operations.

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[60] *Carroll v. Morgan*, 17 F.3d 787, 789-90 (5th Cir. 1994).

[61] *Brock*, 874 F.2d at 313.

As example, in his affidavit, Dr. Baker cited specific scientific textbooks and literature which confirmed pneumoconiosis and other illnesses suffered by Petitioners are in fact caused by exposure to "inhaled particles of silica and other micro particles that are consistent with the methods used in uranium surface mining operations." (Appendix, p. A-156). Dr. Baker reviewed X-rays of Petitioners, and identified those individuals who now suffer from pneumoconiosis. Similarly, Dr. Smith and the other experts also identified specific illnesses caused by exposure to uranium mining and milling operations. Clearly, the affidavit testimony and cited scientific literature confirmed general causation.

Specific causation

Under the guidelines imposed by the Fifth Circuit, proof of causation only requires testimony that exposure to these substances was a "substantial factor" in causing the injuries of these specific Petitioners.[62] Conclusively, specific causation can be established by medical testimony from a medical doctor, such as Dr. Smith, Dr. Baker or Dr. Ratzjczak.[63]

> .The Fifth Circuit has held that medical testimony on the issue of specific causation satisfies

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[62] *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985).

[63] Petitioners are not required to prove that the injury would not have happened "but for" Respondents' products or that the product was the sole cause of the illness. Instead, under the "substantial factor" test, applied in mass toxic tort cases, Petitioners need only show that exposure to the uranium mining products was a substantial factor in causing the injuries. *Gideon*, 761 F.2d at 1145.

> *Daubert*[64] if the doctor bases his opinions on an examination (or a review of the medical records), his experience, and a broad reading of the medical literature.[65]

Petitioners met even the most restrictive burden by establishing with the testimony of Dr. Smith, Dr. Baker, Dr. Ratzjczak and the other experts, that exposure to Respondents' mining and milling operations caused the precise injuries asserted. Specifically, those experts examined the individuals, reviewed medical records, reviewed X-rays, conducted studies on laboratory samples, and studied the relevant scientific literature. Then, based upon their knowledge and experience, each opined as to the causation for Petitioners' specific illnesses. By any definition, the affidavit testimony satisfies the burden for specific causation.

Further, as validated by the cited literature, the experts testified that the Petitioners were exposed to the minimum dosages for sufficient duration of time, to incur the specific illness contracted. As illustration, based upon his review of the literature, Dr. Smith stated that:

> Molybdenum dosage 1-19 mg/day over a period of three to seven years causes pneumoconiosis . . . The individuals . . . were unprotected from exposure periods exceeding three years . . . Consistent with the sample testing conducted . . . the individuals . . . received dosages in excess of the [minimum] thresholds . . .

(Appendix, p. A-142).

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[64] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[65] *Kelley v. American Heyer-Schulte*, 957 F.Supp. 873, 883 (W.D. Tex. 1997), *citing Carroll v. Morgan*, 17 F.3d 787, 789-90 (5th Cir. 1994).

Time and duration of exposure

The mining and milling operations were conducted in Karnes County and adjoining counties for more than 40 years. Most of the Petitioners lived in these areas for their entire lives, some for the majority of the duration of the mining and milling operations. Many of Petitioners actually worked in the mines and milling operations for 20, 30 or more years, and were continuously and systematically exposed to the compounds and substances utilized and produced in mining and milling operations, all specifically identified. To further quantify exposure in exact minutes, hours, or specific dates would be both unrealistic and insurmountable. To specify the precise amount of exposure to each particular chemical or substance, or to specify the illnesses from *each* particular chemical or substance separately, is impossible. Not surprisingly, the relevant case law does not require such detail and specification.[66]

Most importantly, Petitioners conclusively established each individual had exposure to sufficient (minimum) dosage required to establish causation for each particular illness. Practically, such a showing has been realized as sufficient in litigation of similar mass toxic tort cases.[67] Because of the mining and milling operations and consequential release of contaminants into the ground, water and environment, Petitioners were exposed for years; essentially continually. Petitioners' affidavits conclusively established each individuals' (minimum) exposure to sufficient (minimum) dosage required to establish causation for each particular illness. No more is required.

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[66] *Allen v. Pennsylvania Eng. Corp.*, 102 F.3d 194, 199 (5th Cir. 1996).

[67] *Id.*

Onerous district court order

The order issued by the magistrate judge and subsequently affirmed by the district court, was overly burdensome and abusive in requiring Petitioners to establish causation, without the benefit of disclosure or discovery. Specifically, that order required *each* Petitioner to produce *an* affidavit from a "qualified" expert that, as to each appellant:

(1) stated with particularity the dosage of exposure;
(2) provided scientific and medical basis for each opinion regarding illnesses or conditions suffered;
(3) named the specific tests conducted and indicated results of each test;
(4) provided employment information for each Petitioner exposed during employment;
(5) provided residence information;
(6) specified time period (duration) of exposure;
(7) specified specific dosage of exposure; and
(8) specify how certain facilities/operations contributed to each injury.

As previously detailed, calculation of precise dosage and exposures are virtually impossible since most of the Petitioners lived in and around the area for many years. Such explicit quantification of dosage seems almost meaningless, and certainly unnecessarily burdensome.

Certainly, the affidavits provided conclusively established each Petitioners' (minimum) exposure to sufficient (minimum) dosage required to establish causation for each particular illness. No more is required, even under *Daubert*.[68]

Petitioners should never have been required to put on their *entire* case with every comprehensively detailed fact, statement, literature, symptoms, piece of all expert opinions, or account for their whereabouts over forty years on each and every day, but were *only* required to meet a threshold test for the Court to see if a *prima facie* showing of a cause of action could be made. Clearly, even under the onerous requirements of the order, *prima facie* causation was established.

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[68] *Daubert*, 509 U.S. at 579.

CONCLUSION

Federal subject matter jurisdiction does not exist. The Price-Anderson Act does not apply to uranium mining activities, nor any activity that lacks an indemnification agreement with the NRC.

Petitioners far exceeded the requirement "to establish a *prima facie* case of causation," and were not required to put on their *entire* case with every comprehensively detailed fact, statement, literature, symptoms, piece of all expert opinions, or account for their whereabouts over forty years on each and every day. Ostensibly, Petitioners were *only* required to meet a threshold test for the Court to see if a *prima facie* showing of a causation existed. Since that burden was met, dismissal of Petitioners' claims was manifestly unjust.

WHEREFORE, it respectfully is prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMISON LEGAL CENTER
BRUCE L. JAMISON
T. BRYAN AKIN III

Attorneys of Record for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51073

CRECENSIO ACUNA; LEONARDO ACUNA, Individually and as next friend of Pedro Acuna, Leonardo Acuna, Jr. & Genaro Acuna, Minors; HELEN LEAL ALANIZ, individually and as next friend of Abel Alaniz, Jr., Justin Alaniz & Nicole Alaniz, Minors; CONSUELO R. AGUERO, Individually and as next friend of Mark Anthony Aguero & Anna Marie Aguero, Minors; JOSE LUIS AGUERO, JR., Individually and as next friend of Patrick T. Aguero, a Minor; ET AL

Plaintiffs-Appellants,

v.

BROWN & ROOT INC.; ET AL,

Defendants

BROWN & ROOT INC.; CHEVRON USA INC., Individually, as parent, and successor in interest to Chevron Resources Company, a division of Chevron Industries, Inc.; CONOCO, INC.; CONTINENTAL OIL COMPANY; EXXON CORPORATION; RIO GRANDE RESOURCES CORPORATION; GENERAL ATOMICS, doing business as General Atomics Corp.; ATLANTIC RICHFIELD COMPANY, as successor in interest to Anaconda Company; INTERCONTINENTAL ENERGY CORPORATION, doing business as IEC Corporation

Defendants-Appellees.

* * *

No. 98-51133

REBECCA GARCIA, Individually and as next friend on Stephanie Renee Garcia, a minor; ROGELIO GARCIA; ROMONA GARCIA; SYLVIA M. GARCIA; YOLANDA GARCIA, Individually and as next friend of Roxanne Garcia, Rafael Garcia, Minors, ET AL

Plaintiffs - Appellants

v.

CONOCO INC; ET AL

Defendants

CONOCO INC; CONQUISTA PROJECT CORPORATION; CONTINENTAL OIL CO; CHEVRON CORPORATION; CHEVRON RESOURCES; EXXON CORPORATION; GENERAL ATOMICS, doing business as General Atomics Corp; TOTALE INC; CHEMICAL WASTE MANAGEMENT INC; CHEMICAL WASTE MANAGEMENT OF TEXAS, INC; TOTALE CORPORATION; TOTAL AMERICAN MINING, INC; MALAPAI RESOURCES COMPANY; EVEREST IMINERALS CORPORATION; PIONEER CORPORATION; PIONEER NUCLEAR INC; ATLANTIC RICHFIELD COMPANY; SUSQUEHANNA-WESTERN INC, RIO GRANDE RESOURCES CORPORATION; INTERCONTINENTAL ENERGY CORPORATION; URANIUM RESOURCES INC; GILBERT CONSTRUCTION GOMPANY OF TEXAS, INC; GILBERT CONSTRUCTION COMPANY II; GILBERT CONSTRUCTION COMPANY; OXY MINERALS CORPORATION; MO-VAC INCORPORATED; E G GONZALES TRUCKING & PAVING; BUDDY SMITH DRILLING COMPANY;

GARCIA CONSTRUCTION; BAY INC, doing business as Bay Materials; DAHLSTROM CONSTRUCTION CO; DAHLSTROM INTERNATIONAL INC; DAHLSTROM ENTERPRISES INC; DAHLSTROM HOLDING CORPORATION; DAHLSTROM TRUCKING COMPANY, INC; HAVANNA INC, doing business as Havanna Materials; HELDENFELS BROTHERS INC; INTERNATIONAL ENGINEERING CO; SCOTT DAVIDSON TRUCKING; DAVIDSON CONSTRUCTION & TRUCKING; MARCUS GARCIA; G P MATERIALS INC; MCKENZIE CONTRACTORS INC; MCKENZIE MATERIALS INC; BROWN & ROOT INC; LONE STAR DRILLING COMPANY INC; LONE STAR DRILLING CORPORATION; LONE STAR STATE DRILLING CORPORATION; LONE STAR FOUNDATION DRILLING INC; LONE STAR DRILLING COMPANY; BEACKLEY DRILLING; TEPCORE DRILLING INC; CHEM-WASTE MANAGEMENT; REDGY SUYLLIVANT DRILLING; CENTURY GEOPHYSICAL CORP; CENTURY GEOPHYSICAL MOBILE SERVICE; ANACONDA COMPANY; PAWALEX SUPPLY; DSI; WESTINGHOUSE ELECTRIC CORPORATION; REX LILLY SANDBLASTING; WYOMING MINERSALS; GREYBACK CONSOLIDATED INC; BUCKALOO INC; ANALOG; HERBIE MCNITCH WATERWELL SERVICES; JOHN DOE COMPANIES

Defendants – Appellees

Appeals from the United States District Court
for the Western District of Texas

(Filed Jan. 11, 2000)

Before GARWOOD, SMITH and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

The above-captioned cases were consolidated on appeal. They present the common issue of whether jurisdiction in the federal courts is appropriate under the Price Anderson Act, 42 U.S.C. § 2210(n) (2), where plaintiffs have alleged tortious injury arising from uranium mining activity. Plaintiffs-appellants also appeal the imposition of certain pre-discovery orders and argue, in the alternative, that they satisfied any burdens placed upon them and that their cases should not have been dismissed. As discussed below, we find that jurisdiction was proper under 42 U.S.C. § 2210(n) (2) and that dismissal of the cases was proper.

I. *Facts and Procedural History*

Crecension Acuna and other plaintiffs, in total numbering over one thousand, brought suit in Texas state court against defendant companies for alleged personal injuries and property damage arising from defendants' uranium mining and processing activities. Rebecca Garcia and approximately 600 other plaintiffs brought suit alleging similar claims against a partially overlapping set of defendants, most of whom were also engaged in uranium mining activities in another area of Texas.

In both cases, plaintiffs alleged that they were exposed to and injured by the defendants' mining and processing activities. Some plaintiffs worked in uranium mines or processing plants, while others alleged exposure to radiation or uranium dust or tailings through contact with family members who worked in the mines or through environmental factors such as wind and groundwater. Plaintiffs alleged a range of injuries as well as durations and intensities of exposure.[1]

Both suits were filed in Texas courts, alleging causes of action under state law. Defendants removed the cases to the federal district court for the Western District of Texas, where they were treated as related cases. Over plaintiffs' objections, that court asserted jurisdiction under the Price Anderson Act, 42 U.S.C. § 2210(n) (2). First in *Acuna* and then in *Garcia*, the court issued pre-discovery scheduling orders that required plaintiffs to establish certain elements of their claims through expert affidavits. Those affidavits had to specify, for each plaintiff, the injuries or illnesses suffered by the plaintiff that were caused by the alleged uranium exposure, the materials or substances causing the injury and the facility thought to be their source, the dates or circumstances and means of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions.

In response to the order issued in *Acuna*, plaintiffs submitted just over one thousand form affidavits from a single expert, Dr. Smith. Those affidavits identified a series of illnesses and effects that can occur as a result of uranium exposure and stated that the relevant plaintiff suffered from some or all of them. The affidavits stated that Dr. Smith had reviewed the plaintiff's medical data and had come to the conclusion that exposure to uranium and its byproducts had reached clinically significant doses. The affidavits went on to list all of the mining facilities covered in the lawsuit as responsible for each plaintiff's exposure and routes of exposure as including inhalation, ingestion, and direct skin contact. The affidavits also included a list of scientific studies and materials.

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[1] Plaintiffs also originally alleged property damage, but the latter claim appears to have been dropped at the district court and does not form part of this appeal.

The magistrate judge found that the affidavits did not comply with the scheduling order, reiterated some of the requirements of the order, and gave plaintiffs an additional month to comply. Plaintiffs then submitted additional affidavits by Dr. Smith and two other experts. Some individuals were identified in these affidavits as suffering from particular diseases but the other required information was not provided regarding their claims. The supplemental affidavits did not provide any new information regarding the specific claims of the vast majority of plaintiffs. The magistrate judge found that these additional affidavits still failed to meet the specificity requirements of the order and recommended that the case be dismissed. The district court issued a memorandum and order dismissing the case.

An identical pre-discovery order was issued some months later in *Garcia*. Plaintiffs in that case submitted only one affidavit by Dr. Smith, designed to cover all plaintiffs' claims. Following the magistrate judge's recommendation, the district court dismissed the case for failure to comply with the order. Plaintiffs in both cases appeal.

II. *Analysis*

A. *Federal Jurisdiction*

Plaintiffs in both cases contend that removal was improper under the Price Anderson Act. They argue that neither the statutory language nor Congressional intent confers federal jurisdiction over claims arising from uranium mining and related activities. Defendants counter that the Act was meant to create federal jurisdiction over all claims connected to the nuclear power and weapons industries, including the mining and processing of uranium.

The district court's exercise of jurisdiction is reviewed de novo, *see Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995), and doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction. *See Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). We find that the Price Anderson Act does confer exclusive federal jurisdiction over the claims in this case.

The Price Anderson Act sets up an indemnification and limitation of liability scheme for public liability arising out of the conduct of the nuclear energy and weapons industries. The jurisdictional provision in question here, 42 U.S.C. § 2210(n) (2), was amended in 1988 to expand jurisdiction. Previously, only those claims arising out of an "extraordinary nuclear occurrence" were subject to automatic federal jurisdiction. The section now reads, in relevant part:

> (2) With respect to any public liability action arising out of or resulting from a *nuclear incident*, the United States district court in the

> district where the incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n) (2). 42 U.S.C. § 2014 defines "nuclear incident" as encompassing any occurrence causing personal or property damage arising out of the toxic, radioactive, explosive, or other hazardous properties of atomic or byproduct materials.

Plaintiffs seek to limit Price Anderson's jurisdictional grant, relying on a lengthy exposition of the history of the Act and an intricate series of interpolations from definitions elsewhere in the legislation. Taken together, their arguments would posit the following: the jurisdictional grant contained in § 2210(n) (2) is meant only to apply to singular, accidental events at a contract location subject to the indemnification portion of the Act that is not located in a state which regulates its own uranium industry pursuant to an agreement with the Nuclear Regulatory Commission [NRC]. Such a tortured interpretation is unnecessary and runs counter to the plain language of the statute as well as the Congressional intent behind the 1988 amendment of § 2210(n) (2).

There is nothing in the definition of "nuclear incident" which suggests it should be contingent on whether the occurrence took place in a state which regulates its own uranium industry under NRC guidelines or whether the facility is covered under the separate indemnification portions of the Act. "Nuclear incident" is not limited to a single, catastrophic accident: indeed, one purpose behind the 1988 amendments was to expand the scope of federal jurisdiction beyond actions arising from "extraordinary nuclear occurrences" only. *See Kerr-McGee Corp. v. Farley,* 115 F.3d 1498, 1502 (10th Cir. 1997). Plaintiffs' attempts to reintroduce the limitations of "extraordinary nuclear occurrence" into the 1988 amendments' substitution of "nuclear incident" rely on faulty statutory interpretation and are contrary to Congressional intent. *See Carey v. Kerr-McGee Chem. Corp.,* 60 F.Supp.2d 800, 803-07 (N.D. Ill. 1999) (analyzing history and impact of § 2210(n) (2) and refuting the same arguments made by plaintiffs in the instant case contained in *Gilberg v. Stepan Co.,* 24 F.Supp.2d 325 (D.N.J. 1998)).

Courts that have considered the general question of the scope of jurisdiction under the 1988 amendments have found that Congress intended to create an exclusive federal cause of action for torts arising out of nuclear incidents. *See, e.g., Roberts v. Florida Power & Light Co.,* 146 F.3d 1305 (11th Cir. 1998); *In re Three Mile Island II,* 940 F.2d 832 (3d Cir. 1991).

Uranium extraction and processing are part of the nuclear weapons and power industries, and therefore come within the ambit of § 2210(n) (2). *See Nieman v. NLO, Inc.,* 108 F.3d 1546 (6th Cir. 1997) (Act creates federal cause of action for continuing trespass from a uranium processing plant); *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498 (10th Cir. 1997) (Act would preempt state suit for injuries arising from uranium mining and processing). *Cf. In re Cincinnati Radiation Lit.,* 874 F.Supp. 796, 832 (S.D.

Ohio 1995) (injuries resulting from medical experimentation with radiation not intended to come under § 2210(n) (2)). The district court's exercise of removal jurisdiction under 42 U.S.C. § 2210(n) (2) was proper.

B. *Pre-trial Procedure in the District Court*

Plaintiffs contend that the pre-discovery orders requiring expert support for the details of each plaintiff's claim imposed too high a burden for that stage of litigation. In the alternative, they argue that they in fact complied with the orders and that their cases should be remanded for discovery and trial. The district court's dismissal of plaintiffs' claims in *Garcia* is reviewed for plain error, because plaintiffs did not make a timely objection to the magistrate judge's recommendation of dismissal. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1424 (5th Cir. 1996) (en banc); *see also Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123-24 (5th Cir. 1997). Plaintiffs did file an objection in *Acuna*, and the district court therefore conducted a de novo review of the recommendation to dismiss. We review the district court's dismissal order under Fed.R.Civ.P. 16(f) for abuse of discretion. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994).

The pre-discovery orders in issue are of a type known as *Lone Pine* orders, named for *Lore v. Lone Pine Corp.*, No. L-33606-85 (N.J. Super. Ct. 1986). *Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation. In the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed.R.Civ.P. 16.

In these two cases, treated as related in the district court, there are approximately one thousand six hundred plaintiffs suing over one hundred defendants for a range of injuries occurring over a span of up to forty years. Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which facilities were alleged to have caused those injuries. It was within the court's discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990); *Fournier v. Textron, Inc.*, 776 F.2d 532, 534 (5th Cir. 1985) (noting district court's authority to manage and develop complex litigation discovery).

The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed.R.Civ.P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries. *See Beanal v. Freeport-McMoran, Inc.*, ___ F.3d ___, 1999 WL 1072274 *4 (5th Cir.) (plaintiff's complaint is insufficient where it is devoid of "names, dates, locations, times, or any facts that would put [defendant] on notice as to what conduct supports . . . his claims"). The affidavits supplied by plaintiffs did not provide this information. The district court did not commit clear error or an abuse of discretion in refusing to allow discovery to proceed without better definition of plaintiffs' claims.

III. *Conclusion*

We find that the Price Anderson Act, 42 U.S.C. § 2210(n) (2), conferred federal jurisdiction over the cases before us and that removal was therefore proper. We also find that the district court's pre-discovery orders and orders of dismissal were not abuses of its discretion. We therefore AFFIRM the judgments of the district court.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51073

D.C. Docket No. SA-96-CV-543

CRECENSIO ACUNA; LEONARDO ACUNA, Individually and as next friend of Pedro Acuna, Leonardo Acuna, Jr & Genaro Acuna, Minors; HELEN LEAL ALANIZ, Individually and as next friend of Abel Alaniz, Jr, Justin Alaniz & Nicole Alaniz, Minors; CONSUELO R AGUERO, Individually and as next friend of Mark Anthony Aguero & Anna Marie Aguero, Minors; JOSE LUIS AGUERO, JR, Individually and as next friend of Patrick T Aguero, a Minor; ET AL

Plaintiffs - Appellants

v.

BROWN & ROOT INC; ET AL

Defendants

BROWN & ROOT INC; CHEVRON USA INC, Individually, as parent, and successor in interest to Chevron Resources Company, a division of Chevron Industries, Inc; CONOCO, INC; CONTINENTAL OIL COMPANY; EXXON CORPORATION; RIO GRANDE RESOURCES CORPORATION; GENERAL ATOMICS, doing business as General Atomics Corp; ATLANTIC RICHFIELD COMPANY, as successor in interest of to Anaconda Company; INTERCONTINENTAL ENERGY CORPORATION, doing business as IEC Corporation

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, San Antonio.

Before GARWOOD, SMITH, and BENAVIDES, Circuit Judges.

JUDGMENT

(Filed Feb. 10, 2000)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

United States District Court
Western District of Texas

CRECENSIO ACUNA,
et al.,
Plaintiff(s),
v.
BROWN & ROOT, INC.,
et al.,
Defendant(s).

JUDGMENT IN A CIVIL CASE

CASE NUMBER: SA 96 CA 543 OG

(Filed Sep. 30, 1998)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

the Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on February 2, 1998 be and is ACCEPTED pursuant to 28 U.S.C. 636(b)(1) such that Defendants' motion to dismiss (Docket No. 72) is GRANTED and Plaintiff's claims are DISMISSED, with prejudice.

September 30, 1998
Date

William G. Putnicki
Clerk

/s/ Rosanne M. Illegible
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA, et al.,)
Plaintiff(s),)
) CIVIL ACTION NO.
v.) SA-96-CA-543-OG
BROWN & ROOT,)
INC., et al.,)
)
Defendant(s).)

ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION

(Filed Sep. 30, 1998)

Before the Court is the Memorandum and Recommendation of the United States Magistrate Judge, filed in the above-styled and numbered cause on February 2, 1998, the objections to the Memorandum and Recommendation, filed by Plaintiffs Crescensio Acuna et al. on February 17, 1998, and Defendants Brown & Root, Inc., Chevron U.S.A., Inc., Conoco, Inc., Atlantic Richfield Co., Exxon Corp., General Atomics, Rio Grande Resources Corp., Continental Oil Co. and Intercontinental Energy Corp.'s response to those objections, filed April 29, 1998.

Where no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of it. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made.") In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

On the other hand, if any party objects to the Memorandum and Recommendation, the Court must review it de novo. *See Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 646 (5th Cir. 1994); *Longmire v. Guste*, 921 F.2d 620, 623 (5th Cir. 1991). Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

Because of the grave consequences presented by Defendants' motion – the dismissal of all of Plaintiffs' claims with prejudice – this Court took the somewhat unusual step of holding a hearing on Plaintiffs' objections to the Magistrate Judge's Memorandum and Recommendation on September 24, 1998. *See* 28 U.S.C. § 636(b)(1)(C)(3) (judge may receive further evidence in determining whether to accept, reject or modify Magistrate Judge's findings); *Freeman v. County of Bexar*, 142 F.3d 848, 852-53 (5th Cir. 1998) (indicating circumstances under which district court may appropriately receive new evidence in *de novo* review of a Magistrate Judge's decision). It was the Court's desire to give Plaintiffs the benefit of every doubt with regard to their ability to identify the nature of their injuries in this case, the cause of those injuries and the basis for Defendants' alleged responsibility for them. Unfortunately, despite the twenty-eight months that this case has been pending, the several opportunities Plaintiffs have had to comply with the Court's scheduling orders, and the more than hour-long hearing conducted on Plaintiffs' objections to the Memorandum and Recommendation, the Court is no further in determining the answers to these questions than when the case was originally removed to this Court in May of 1996. Therefore, for the reasons outlined below, the Court accepts the Magistrate Judge's recommendation to grant Defendants' motion to dismiss for failure to comply with the scheduling order.

I. Background.

On May 24, 1996, Defendants Brown & Root and Chevron Corporation removed this case to federal court under the Price-Anderson Act, 42 U.S.C. § 2210(n) (2). The Act grants the Court jurisdiction over actions arising out of a "nuclear incident," which is defined to include uranium mining activities of the type at issue in this case. *See Id.* § 2014(q), (z). On December 21, 1996, the Court referred this case to a Magistrate Judge for disposition of all pretrial matters.

Due to the size and complexity of the case, the Magistrate Judge accepted proposals on the form of an amended scheduling order and permitted further briefing on the merits of those proposals. On April 11, 1997, the Magistrate Judge entered an amended scheduling order generally conforming to Defendants' proposal, which required Plaintiffs to submit affidavits establishing a prima facie case of causation within ninety days. Specifically, each plaintiff claiming personal injury was to:

(1) List all injuries, illnesses or conditions suffered by the plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation;

(2) Specify the material(s) or substance(s), that, in the opinion of the expert, caused each injury, illness or condition listed and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e., ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and

(4) State the scientific and medical bases for the expert's opinions. (Docket No. 54 at 9.) Plaintiffs alleging property damage were to provide affidavits containing similar information. After these affidavits were to have been submitted, the order provided for a status conference, followed by an initial discovery phase as to Plaintiffs' expert witnesses, mediation, and then full discovery. (*See id.* at 9-11.)

On June 5, 1997, Plaintiffs moved for reconsideration of the Magistrate Judge's ruling, arguing that it violated Fifth Circuit precedent in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), an issue raised in their initial briefing on scheduling recommendations. They further claimed that amended scheduling order was "essentially . . . a summary judgment motion," and that it was no more proper to require them to show causation at this stage of the litigation than to impose on Defendants the burden to "establish a good-faith defense of showing non-use of the toxic substances, non-toxicity of the substances, non-exposure of any of the plaintiffs, and non-causal relationship." (Docket No. 56 at 2.) The Magistrate Judge summarily denied Plaintiffs' request for reconsideration, noting that their arguments had been addressed fully in the disputed order. (*See* Docket No. 58.)

On August 5, 1997, Defendants moved to dismiss the case with prejudice or, alternatively, to enforce the scheduling order after receiving what they felt were grossly insufficient affidavits submitted by Plaintiffs in attempted compliance with the scheduling order. They noted that, while Plaintiffs produced 1,058 separate affidavits, all were by the same affiant, Dr. C.F. Smith. According to Defendants, Dr. Smith offered opinions beyond his apparent expertise as a physician, particularly with respect to the identification of the toxic substances allegedly released during the Defendants' uranium mining operations and the manner in which the Plaintiffs were allegedly exposed to those substances. More importantly, rather than stating the specific injury or illness that each Plaintiff experienced as a result of that exposure, Dr. Smith stated only that each Plaintiff "suffered from some of all of the following injuries and impairments to health . . . which were caused by exposure to chemicals, compounds, materials and by-products of uranium mining and milling operations in Karnes County, Texas and surrounding areas," and listed a number of such impairments.[1] Connection of Plaintiff to mining operation was also absent. Dr. Smith failed to identify the specific facility that allegedly released the toxic substance(s) to which each Plaintiff was exposed, instead providing a non-exclusive laundry list of eleven facilities that produced or utilized the substances, each allegedly "owned, operated, or controlled by" parties identified in another list of some but not all of the Defendants. Finally, Dr. Smith included a non-exclusive, partially generic list of materials and substances to which each Plaintiff was allegedly exposed, again without connection to the individual or to mining facility.

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[1] Most of the impairments listed were themselves vague and did not represent a clear medical diagnosis of disease or

Plaintiffs responded that their affidavits were in full compliance with the amended scheduling order, arguing

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illness. For example, the listings "pulmonary pathology," "kidney pathology," "integumentary pathology" and "musculoskeletal pathology," without more, are equivalent to stating "disease of the lungs, kidneys, skin or muscles and bones." *See* J. E. Schmidt, 4 Attorneys' Dictionary of Medicine P-112 (1998). "Hepatic enzymes" are merely liver enzymes, not a disease or illness. *Id.* at H-19. "Abnormal porphyrin levels" and "abnormal creatine clearance" may be an indication of underlying illness, but do not appear to be an injury or illness in and of themselves. No explanation of "dysfunctional cellular immune response" or "dysfunctional humoral immune response" was provided.

Dr. Smith's supplemental affidavit is similarly vague as to the nature of "dysfunctional cellular immune response," containing only a bibliographic listing of five references that allegedly document the condition without inclusion of the pertinent material from those references. (*See* Docket No. 72, Ex.C) (attaching as Exhibit A a bibliography). Plaintiffs were specifically advised that merely listing references was insufficient to document this disease. (*See* Docket No. 62 at 4 n. 1).

that Defendants were merely seeking greater detail obtainable though discovery. (*See* Docket No. 60 at 1.) Curiously, Plaintiffs went on to assert that "Defendants have full knowledge that plaintiffs damages are result of uranium mining and related operations," and that "[i]n fact, some related cases had already been settled by these same defendants." (*Id.* n.1.)

In a ruling entered on September 16, 1997, the Magistrate Judge agreed with Defendants that the 1,058 affidavits contained insufficient information. Nevertheless, he denied the motion to dismiss, imposing the lesser sanction of requiring compliance with the scheduling order and giving Plaintiffs a second chance to do so. The Magistrate Judge went to great lengths in his order to explain how the affidavits were deficient and what was required for compliance. Plaintiffs were then given until October 31, 1997 to:

> (1) provide affidavits from qualified experts addressing the subjects required by the scheduling order that are within their area(s) of expertise;
>
> (2) provide affidavits addressing *individualized* information about particular plaintiffs, as required by the scheduling order;
>
> (3) provide affidavits stating a specific medical diagnosis of each individual plaintiff, as required by the scheduling order;
>
> (4) provide affidavits stating alleged exposures individually and with the specificity required by the scheduling order;
>
> (5) provide affidavits stating which of the defendants or operations allegedly caused harm

> to each particular plaintiff, as required by the scheduling order, and
>
> (6) provide affidavits in regard to property damage, as required by the scheduling order, or the failure to provide them will be considered waiver of the property damage claims.

(Docket No. 62 at 6.)

Plaintiffs appealed the above ruling to this Court. On December 29, 1997, the Court entered its order affirming the Magistrate Judge's ruling, addressing in detail the authority permitting the Court to impose upon Plaintiffs the requirement they establish causation at an early stage of the litigation. Specifically, the Court noted that this requirement was entirely congruent with the Federal Rules of Civil Procedure, as recently amended, the Manual for Complex Litigation, and other cases involving similar claims, issues, and complexity. (*See* Docket 74 at 11-13.) In addition, the Court concurred with the Magistrate Judge's assessment of the particular deficiencies in the affidavits.

While the above appeal was pending, Plaintiffs tendered to Defendants their amended affidavits. Rather than submitting a single affidavit for each plaintiff, however, Plaintiffs instead provided four separate affidavits intended to address some or all plaintiffs. Defendants once again believed the affidavits to be insufficient, prompting them to file a supplemental motion to dismiss. In a Memorandum and Recommendation entered on February 2, 1998, the Magistrate Judge recommended granting that motion. In his ruling, as he had with respect to Plaintiffs' first set of affidavits, the Magistrate Judge described in detail the reasons why Plaintiffs' submissions were deficient and why dismissal was appropriate. Plaintiffs now object to that recommendation.[2]

II. Objections to Recommendation.

The Memorandum and Recommendation requires that parties objecting thereto "must specifically identify those findings, conclusions or recommendations are being made and the basis for such objections" and that "the district court need not consider frivolous, conclusive or general objections." (Docket No. 76 at 24.) Here, the Court's review of Plaintiffs' objections to the Memorandum and Recommendation is hampered by Plaintiffs' failure to specify the particular findings that they believe constitute factual or legal error. Nevertheless, as best the Court can determine from the objections, Plaintiffs assert that (1) the Magistrate Judge and this Court once again erred in requiring them to file affidavits at all, (2) the Magistrate Judge erred in holding that their experts were not qualified, even though they were not required to supply affidavits from a "particular type of expert," (Docket No. 86 at 6), and (3) "by any definition of analysis," their most recent submission "more than complied with the Magistrate Judge's requirement . . . that plaintiffs establish *prima facie* causation." (*Id.* at 2.) The Court will address these objections in turn. Familiarity with the Court's prior rulings in the pleadings upon which they are based is presumed.

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[2] On February 17, 1998, the Court received Plaintiffs' "preliminary" objections to the Recommendation. Plaintiffs also requested leave to supplement these objections within sixty days. By order dated February 27, 1998, the Court granted that request, requiring supplementation on or before April 15, 1998 and allowing Defendants an opportunity to respond on or before April 30, 1998. No supplemental objections were ever filed.

Plaintiffs' first argument, that the Magistrate Judge improperly required them to make a prima facie showing as to causation before commencement of discovery, was fully addressed in the Court's December 29, 1997 order affirming the Magistrate Judge's ruling. The Court need not reiterate its reasoning here, other than to address Plaintiffs' persistent mischaracterization of the *Lone Pine* provision as tantamount to a requirement that they defeat a motion for summary judgment as to causation at this early stage of the litigation.

The affidavit requirement merely ensures that Plaintiffs possess the minimum factual basis for their claims necessary to justify allowing full scale discovery to proceed, and to give Defendants a fair indication of the nature of those claims to permit discovery to be reasonably focused. The information required in each affidavit is the minimum that Plaintiffs should have possessed upon commencing this lawsuit, as mandated by the factual investigation requirement of Rule 11. *See* Fed. R. Civ. P. 11(b)(3) (attorney who signs and files a complaint or other pleading certifies that, to the best of his knowledge, formed after reasonable inquiry under the circumstances, "the allegations and other factual contentions have evidentiary support after a reasonable opportunity for further investigation or discovery.") As one court addressing similar circumstances explained:

> [T]he causation reports [required by pretrial order] were meant to serve as a Rule 11 safeguard. The court specifically noted that Fed.R.Civ.P. 26 testifying expert reports were not required at this time. These reports were not intended to be used as subjects for motions that are tantamount to summary judgment. It may be that these cases never get to the trial stage, however, that consideration is not part of the court's reasoning for requiring the causation reports. *The causation report is simply a procedural requirement that each plaintiff must fulfill to satisfy the court that the attorneys had a reasonable basis to pursue the claims asserted in the complaints filed on their client's behalf. Under this rationale, the minimum standard that each causation report must meet is whether the court would consider an attorney bringing a claim against a defendant in this litigation based on the causation report to be in violation of Rule 11.*

In re Orthopedic Bone Screw Products Litigation, No. MDL 1014, 1998 WL 411370 (E.D. Pa. January 13, 1998) (Pretrial Order No. 1238) (emphasis added). Thus, the Court does not assess whether Plaintiffs' affidavits are sufficient under a summary judgment standard; it considers merely whether each affidavit would support the filing of a lawsuit under a Rule 11 standard. As explained in further detail below, even under this more lenient standard, the affidavits fail.

Plaintiffs' second contention, that the Magistrate Judge erred in requiring a "particular type of expert" to submit the affidavits, (Docket No. 86 at 6), similarly misses the boat. The Magistrate Judge required Plaintiffs to "provide affidavits from qualified experts addressing the subjects required by the scheduling order that are within their area of expertise." (Docket No. 62 at 6.) Those subjects included a specification of the substance allegedly causing the plaintiff's injury, an explanation of the manner in which the plaintiff was exposed to the substance, and the scientific and medical basis for the expert's opinion in this regard. (*See id.* at 2.) Plaintiffs are correct in claiming that the Magistrate Judge's orders never specified the particular type of expert required. But that does not excuse Plaintiffs from the requirement that the experts they offer actually be qualified in the subject matter in which he testifies.

Under Fed. R. Evid. 702, " '[t]o qualify as an expert, the witness must have specialized knowledge or training such that his or her testimony will assist the factfinder in the determination of a fact issue.' " *United States v. West*, 58 F.3d 133, 140 (5th Cir. 1995). Whether a particular witness is qualified to render an opinion on the subject matter in question is an issue for the Court, and is a matter over which it exercises considerable discretion. *See generally General Elec. Co. v. Joiner*, 118 S. Ct. 512 (1997). Qualification is a threshold requirement. *See Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991); *Edmonds v. Illinois Central Gulf R.R. Co.*, 910 F.2d 1284, 1287 (5th Cir. 1990). The label placed on the expert is irrelevant; rather, the question is whether that individual has " 'such knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.' " *United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978) (citation omitted); *see also Christopherson*, 939 F.2d at 1112-13. As the Court explained in *Daubert v.*

Merrill Dow Pharmaceuticals, Inc., the "relaxation of the usual requirement of firsthand knowledge – a rule which represents 'a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information," ' – is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience *of his discipline.*" 509 U.S. 579, 592 (1993) (emphasis added) (citation omitted).[3]

The latter italicized phrase captures the nub of the issue in this case: while the experts offered by Plaintiffs may be qualified to render their opinion as to the diagnoses of Plaintiffs' respective illnesses, none appear even minimally qualified to render opinions on the cause of those illnesses and in particular, the manner in which Plaintiffs were allegedly exposed to the variety of toxic substances at issue in the case. This is not a case in which exposure to a particular substance can be assumed, as, for example, in a products liability case where a particular device has been implanted in the body. Establishing how, when and to what substances Plaintiffs were exposed is a core issue in the case and is necessarily the subject of qualified expert testimony. In the hearing on Plaintiffs' objections, Plaintiffs counsel indicated that Dr. Smith, the expert upon which Plaintiffs most heavily rely in this regard, obtained his information regarding exposure anecdotally during his examination of each plaintiff, not from relevant studies or testing in the field. Although Dr. Smith indicated that he reviewed peer-reviewed scientific literature to reach his conclusions, as the Magistrate Judge rightly observed, "Dr. Smith is not a hydrogeologist, microbiologist, toxicologist or expert whose opinion could be used to establish whether a certain dosage, method and frequency of contact is sufficient to cause certain injuries." (Docket No. 76 at 14.) Plaintiffs fail to establish that, through some other specialized training or experience, Dr. Smith or any of the other experts who filed affidavits is qualified to render opinions as to Plaintiffs' alleged exposure. Thus, the Magistrate Judge did not err in finding that Plaintiffs' affidavits failed to establish, by qualified expert testimony, the manner and method of Plaintiffs' alleged exposure to toxins. *See generally, Joiner*, 118 S. Ct. at 519 ("[N]othing in Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.")

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[3] Moreover, qualification of an expert is a different issue from whether the expert's methodology is reliable under *Daubert* and its progeny. *See Daubert*, 509 U.S. at 582-83 (indicating that qualifications of experts were not in question). The Magistrate Judge did not address the latter issue, and neither does this Court. For this reason, Plaintiffs' references to *Kelly v. American Heyer-Schulte Corp.*, 957 F. Supp. 873 (W.D. Tex. 1997), and *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194 (5th Cir. 1996), during the hearing on objections to the Memorandum and Recommendation are inapposite.

As to Plaintiffs' final argument, that their supplement affidavits more than complied with the spirit and the letter of the scheduling order, the Court wholeheartedly agrees with the Magistrate Judge's assessment of the supplemental affidavits. Plaintiffs submitted the affidavits of four persons: Dr. Glen D. Baker, Dr. Kenneth J. Ratajczak, Aristo Vojdani, Ph.D., and Dr. Charles F. Smith. The affidavit of Dr. Baker indicates that he examined

X-rays and found evidence of pneumoconiosis in 27 persons, *only 13 of which are Plaintiffs in this case.* Likewise, he found abnormalities in 22 other cases, *only 12 of which involve Plaintiffs in this case.* Dr. Ratajczak's affidavit similarly problematic. He diagnosed pneumoconiosis in 9 individuals, 7 *of which are Plaintiffs,* and abnormalities in 19 others, *15 of whom are Plaintiffs.*[4] Dr. Vojdani indicates that he analyzed laboratory samples provided by Dr. C.F. Smith for "cellular and immune system dysfunction," and that in his opinion,

> these individuals inhaled or consumed particles of radioactive uranium, silica and other micro particles that are consistent with the methods used in uranium surface mining operations. In addition to these particles of highly toxic substances, these individuals were also exposed to toxic chemicals, which are not only capable of altering immune system functioning, but are also able to cause the clearly present abnormalities I observed and noted in my examination of laboratory blood samples.

(Vojdani Affid. at 2.) Notably, the "individuals" referenced by Dr. Vojdani *are not identified by name or by any other means.* Therefore, it is impossible to determine which of the 1,058 Plaintiffs Dr. Vojdani found to have the abnormalities; nor is the nature of those abnormalities explained.

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[4] The individuals listed in these affidavits who are *not* Plaintiffs in this case appear to be plaintiffs in the similar case of *Garcia v. Conoco, Inc.*, No. SA-96-CA-1079. The two cases have not been consolidated.

Dr. Smith's supplemental affidavit, though comprising thirteen single-spaced pages, likewise fails to indicate the disease or injury suffered by each plaintiff, the substance or material alleged to cause that injury, how the plaintiff was exposed to the substance and in what frequency, duration and dosage. In his affidavit, he groups 877 plaintiffs[5] into three categories: (1) those who were directly employed in the mining facilities and those who were required by their employment to be present at these locations, and (2) the spouses of those persons, and (3) the children of those persons. Once again, there is no plaintiff-by-plaintiff identification of illness, substance causing the illness and means of exposure. While Dr. Smith has identified the members of the first group listed above in an exhibit to his affidavit, no similar exhibit is included as to the second or third groups. Furthermore, Dr. Smith has included an exhibit listing certain toxic substances and the diseases they cause, but he has not equated these substances with any of the facilities operated by the Defendants, a matter beyond his expertise as described in his original or supplemental affidavit. Finally, *none* of the affidavits contain any of the required information as to any plaintiff claiming property damage.

Viewed in the light most favorable to Plaintiffs, the affidavits collectively submitted indicate the nature of the injuries as to some plaintiffs, current residence information and past employment information as to some plaintiffs, medical test results as to most plaintiffs (the significance of which is not explained) and generic information as to toxic substances and the diseases they cause. To date, however, Plaintiffs *not* indicated as to any given plaintiff (1) the specific substance alleged to have caused that plaintiff's injury, (2) from which mining facility that substance allegedly emanated, and (3) how and in what concentration the plaintiff received his or her exposure to the substance. Furthermore, Plaintiffs have never provided information as to their claims of property damage, and the Court accepts Plaintiffs' counsel's representation at the hearing that Plaintiffs have abandoned these claims.

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[5] (*See* Affid. at 3) (" . . . I have made great efforts to categorize the 877 plaintiffs in this case.") Smith's affidavit does not address the other 181 plaintiffs, some of whom are presumably deceased.

In these circumstance, the Court has no choice but to conclude that Plaintiffs are either unwilling or unable to provide the foregoing information and that a sanction less than dismissal would be fruitless. *See* Fed. R. Civ. P. 16(f); *Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 627 (5th Cir. 1997). Their pattern of obfuscation,[6] coupled with their repeated assertion that "some related cases have already been settled by these same defendants," (*see, e.g.* Docket No. 73 at 2 n. 1; Docket No. 86 at 3 n.3), an indication that Plaintiffs have brought this action without sufficient factual investigation and for the concerted purpose to coerce a settlement from Defendants in violation of Rule 11, further justifies the Court's conclusion. Accordingly, the Court finds that the Memorandum and Recommendation should be accepted.

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[6] This pattern has continued to the present date. For example, during the hearing on Plaintiffs' objections, the Court queried counsel whether he could identify for the Court, as to any individual plaintiff he selected, the nature of that person's injury, what substance caused that injury and what mining facility the substance came from. Counsel requested permission to continue his argument, promising to reveal that information later but never delivering. Counsel presented to the Court that the record contained information establishing the particular dosage of each toxic substance to which each Plaintiff was allegedly exposed. The record is devoid of such information. The Court requested counsel to disclose the basis for Defendant Brown & Root's presence in this lawsuit; counsel answered that

IT IS ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on February 2, 1998 be and is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' motion to dismiss (Docket No. 72) is GRANTED and Plaintiffs' claims are DISMISSED, with prejudice.

SIGNED and ENTERED this 30 day of September, 1998.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

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its unspecified "contractual relations" with other parties, discovered *after* initiation of the suit, justified its presence as a Defendant. Finally, the Court requested counsel to provide a complete copy of Dr. Smith's supplemental affidavit, with all exhibits thereto, to allow the Court to ensure that it has given full consideration to all the information provided to Defendants. Counsel responded by filing a letter stating: "Regarding your request that we ascertain whether the Court has a complete supplemental affidavit of Dr. Charles Smith, with exhibits, it appears that the court has all such exhibits." (Docket No. 90 at 1.)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA; §
LEONARDO ACUNA, §
Individually and a/n/f of §
PEDRO ACUNA, LEONARDO §
ACUNA, JR. and GENARO §
ACUNA, Minors; HELEN LEAL §
ALANIZ, Individually and a/n/ §
f/ of ABEL ALANIZ, JR., §
JUSTINE ALANIZ, and §
ANDREA NICOLE ALANIZ, §
Minors; CONSUELO R. §
AGUERO, Individually and a/n/ §
f of MARK ANTHONY §
AGUERO and ANNA MARIE §
AGUERO, Minors; JOSE LUIS §
AGUERO, JR., Individually and §
a/n/f of PATRICK T. AGUERO, §
a Minor; FRUCTUOSO TORRES §
AGUILAR; MARIA DE LA PAZ §
AGUILAR, Individually and §
a/n/f of ALBERT V. AGUILAR, §
DANIEL AGUILAR, and §
SELFINA VILLANEUEVA §
AGUILAR, Minors; PATRICIA §
ALICE GARZA, Individually, as §
Representative of the Estate of §
ERNESTO AGUIRRE, JR., §
Deceased and a/n/f of ERNEST §
MATTHEW AGUIRRE, a Minor; §
ABEL RAMIREZ ALANIZ; §
ALONZO R. ALANIZ a/n/f of §

CIVIL ACTION
NO. ____________

NOTICE OF
REMOVAL

a/n/f of MATTHEW J. ALANIZ §
and JOSHUA J. ALANIZ, §
Minors; GLORIA T. ALANIZ §
a/n/f of MARY C. ALANIZ and §
OSCAR E. ALANIZ, Minors; §
MARIA R. ALANIZ a/n/f of §
SALLY JEAN ALANIZ, a Minor; §
MARTIN ALANIZ; AMELIA H. §
ALEMAN; JUAN M. ALEMAN; §
VERNEE LYNN ALLEN; §
BRENDA MORENO §
ALMENDAREZ, Individually §
and a/n/f of PATRICK §
ALMENDAREZ, a Minor; JAMES §
F. ALTAMIRANO; ADELFA §
ALVAREZ a/n/f of JASON §
ALVAREZ, a Minor; ALFREDO §
ALVAREZ, JR.; LILLIE §
ALVAREZ; MARIA LOUISA S. §
ALVAREZ; TEODORO §
ALVAREZ, SR.; TONY §
ALVAREZ; ESPERANZA §
ALVEAR, Individually and a/n/f §
of VIVIAN ALVEAR and DEBRA §
ALVEAR, Minors; NOLBERTO §
ALVEAR, JR.; GIDGET MARIE §
ANDREWS, Individually and §
a/n/f of SHAWN MICHAEL §
ANDREWS and JEFFREY KYLE §
HOUSOS, Minors; FRANK G. §
ARCE; GILBERT ARENAS; §
IRMA G. ARENAS, Individually §
and a/n/f of NICHOLAS A. §
ARENAS and VICTORIA §
NICOLE ARENAS, Minors; §
FELICIANA ARREDONDO; §

ALCARIO R. ARRISOLA; §
ALEJANDRA G. ARRISOLA; §
FLOYD E. BARNES, JR., §
Individually and a/n/f of §
WAYNE BARNES, a Minor; §
JOHN THOMAS BARNES; JOHN §
M. BARRIENTEZ; ROSE MARY §
BARRIENTEZ, Individually and §
a/n/f of ROLANDO §
BARRIENTEZ, a Minor; §
THERESA BARRIENTEZ, §
Individually and a/n/f of ERIC §
RENE BARRIENTEZ; ERLINDA §
CARRION BEAVER, Individually §
and a/n/f of LARKIN J. §
BEAVER, DIMETRA J. BEAVER, §
and JESSICA L. BEAVER, §
Minors; JEROD BEAVER; JUDE §
BEAVER; STELLA BELCHER §
a/n/f of RONALD BELCHER, §
JR. and KIMBERLY BELCHER, §
Minors; LIONEL E. BENAVIDES §
as Representative of the Estate §
of SHANNON LACY LEE §
BENAVIDES, Deceased; §
ARNOLD BERNAL, SR.; LINDA §
BERNAL, Individually and a/n/f §
of LINDA ANN BERNAL and §
ARNOLD BERNAL, JR., Minors; §
HELEN BORROUM, Individually §
and a/n/f of CALEB JORDAN §
BORROUM and ETHAN §
GARETT BORROUM, Minors; §
CHRISTOPHER SHAWN §
BRANIFF, Individually and a/n/f §
of CIARA N. BRANIFF and §

ASHLEY E. BRANIFF, Minors; §
LEON BROADNAX, JR.; DARLA §
J. BURRAGE, Individually a/n/f §
of KRISTIN R. BURRAGE and §
KEITH A. BURRAGE, Minors; §
DWAYNE A. BURRAGE; §
KIMBERLY BURRAGE; JULIA §
CABALLERO CRUZ, as §
Representative of the Estate of §
ELODIA CABALLERO, §
Deceased; MARGARET A. §
CAMACHO a/n/f of MARCELO §
C. CAMACHO, III and ERIC §
RENE CAMACHO, Minors; §
BRADLEY WAYNE CAMPBELL; §
ISABEL BETTY CANTU, §
Individually and a/n/f of §
JOAQUIN SALAZAR, a Minor; §
JOEL ORTIZ CANTU; TERESA §
ACUNA CANTU, Individually §
and a/n/f of ADELIDA CANTU, §
a Minor; ZACARIAS DIAZ §
CANTU; CINDY CARDONA; §
COSEME CARRION; JOYCE §
CARRION, Individually and §
a/n/f of JASON LEAL and §
JESSICA LEAL, Minors; RUDY §
SOLIS CASAREZ; CARLOS §
CASTANEDA; FELICIANA §
CASTANEDA, Individually and §
a/n/f of CARLOS S. §
CASTANEDA, JR., VICTORIA §
CASTANEDA, and CHRISTINA §
CASTANEDA, Minors; JESSICA §
MARIE GARZA-CASTELLANO; §
DOMINGA CASTRO; DELMA §

CHRISTENE CHAPA, §
Individually and a/n/f of AMY §
NICOLE CHAPA and DAVID §
CHAPA, JR., Minors; BEVERLY §
NAN CONWAY, Individually §
and a/n/f of GARY W. ALLEN, §
a Minor; DONALD CURTIS §
CONWAY; ERNEST CORDAWAY, §
JR.; ERNESTINE S. CORDAWAY, §
Individually and a/n/f of §
VICTOR LEE CORDAWAY and §
VICTORIA LYNNE CORDAWAY, §
Minors; GUADALUPE §
MENDOZA CORDOVA, §
Individually and a/n/f of §
BRANDY CORDOVA and LEE §
ANNA YANEZ, Minors; §
ANDREAS G. CORONADO, JR.; §
PAULA CORONADO; REBECCA §
V. CORONADO, Individually §
and a/n/f of ANDREAS G. §
CORONADO, III, a Minor; §
ROLDAN CORONADO; SALLY §
M. CORONADO, Individually §
and a/n/f of ROXANNE M. §
CORONADO, a Minor; §
JULIANA LOPEZ CORTEZ; §
MELQUIADES R. CORTEZ; §
ANNA ALICIA CRUZ, §
Individually and a/n/f of §
JENNIFER CRUZ, a Minor; §
ANTONIA CRUZ; HERLINDA §
C. CRUZ; JUAN OLIVARES §
CRUZ; MARCOS U. CRUZ; §
MATILDA C. CRUZ; PAMELA §
ANN CRUZ a/n/f of ADELINA §

R. VILLAREAL, a Minor; §
RACHEL SOLIZ CRUZ, a/n/f of §
DILLON D. CRUZ, a Minor; §
CELIA CUEVAS, Individually §
and a/n/f of LEEANNE §
CUEVAS, a Minor; FERNANDO §
CUEVAS; ERNEST ALBERT §
DALBOSCO; ROBERT §
DANMIER; ADAM DE LA §
GARZA; BELIA DE LA GARZA; §
GUSTAVO DE LA GARZA; §
JUAN C. DE LOS SANTOS, JR.; §
MARTHA DE LOS SANTOS, §
Individually and a/n/f of §
JESSICA RAE DE LOS SANTOS, §
a Minor; ABEL M. DELEON, §
SR.; ALEJANDRO RAMOS §
DELEON, Individually and a/n/ §
f of MARK ANTHONY DELEON §
and ELIZABETH LEE DELEON, §
Minors; ELDA C. DELEON, §
Individually, as Representative of §
the Estate of ARMANDO M. §
DELEON, SR., Deceased, and §
a/n/f of ARMANDO DELEON, §
JR., JAMES C. DELEON, and §
JASON C. DELEON, Minors; §
ARTURO DELEON; DALIA M. §
DELEON, Individually and a/n/ §
f of ARTURO DELEON, JR.; §
RICHARD L. DELEON, and §
VANESSA JO M. DELEON, §
Minors; ERNESTO ZAMORA §
DELEON, SR.; ERNESTO §
DELEON, JR, Individually and §
a/n/f of JOSHUA S. DELEON, a §

Minor; LUCIA A. DELEON, §
Individually and a/n/f of §
MARIA I. DELEON, GABRIEL §
DELEON, ABEL DELEON, JR., §
CYNTHIA DELEON, §
MARGARET A. DELEON, §
ADRIAN DELEON, and §
CHRISTINE DELEON, Minors; §
MARIA MEDRANO DELEON, §
Individually and a/n/f of §
ERASMO DELEON, a Minor; §
AURORA T. DELUNA; §
GENELLE RAY DELUNA; §
JULIAN DELUNA; CHRISTINE §
DIAZ; ELROY CASAREZ DIAZ; §
HILDA DIAZ, Individually and §
a/n/f of VICTORIA ALANA §
DIAS and ANNALYSA DIAS, §
Minors; MICAHEL LEE DIAZ, §
Individually and a/n/f of §
MICHAEL JONATHON DIAZ §
and NADIA ELIZABETH DIAZ, §
Minors; RICHARD S. DIAZ; §
JAMES ALLEN DONNELL; §
BRENDA ANNETTE MOSES §
DONNELL, Individually and §
a/n/f of HEATHER DAWN §
HALLEY and JAMES COLTON §
DONNELL, Minors; ALFREDO §
LOPEZ DUENES a/n/f of §
MERANDAH L. DUENES, a §
Minor; KAREN STROLENY §
EAVES, Individually and a/n/f §
of PATRICK ALLEN EAVES and §
TAYLOR DEANNE EAVES, §
Minors; LAURA KATHLEEN §

ELLISON; ELVA ESCOBEDO, §
Individually and a/n/f of §
CARLOS GEORGE SANCHEZ §
and STEVEN RAY ESCOBEDO, §
Minors; TROY ESPARZA; §
TERESITA ZAMBRANO §
ESPINOZA, Individually and §
a/n/f of CHRISTOPHER P. §
ESPINOZA and LOUISA E. §
ESPINOZA, Minors; LAVERNE §
SHULAR ESSOUFI, Individually §
and a/n/f of JAMAL PIERRE §
ESSOUFI, a Minor; ALICIA D. §
ESTRADA, Individually and §
a/n/f of VERONICA R. §
ESTRADA, STEPHANIE R. §
ESTRADA, and ROGELIO §
ENRIQUE ESTRADA, JR., §
Minors; CINDY T. ESTRADA, §
Individually and a/n/f of §
DELIA M. ESTRADA and §
ROBERT ESTRADA, JR., Minors; §
JESSE ESTRADA; MARIA §
TREVINO ESTRADA; MATILDA §
ESTRADA a/n/f of ELIAS §
ESTRADA and HAYDEE §
ESTRADA, Minors SYLVIA R. §
ESTRADA, Individually and §
a/n/f of SABRINA MARIE §
ESTRADA, ASHLEY BROOKE §
TEJADA, and J.R. ESTRADA, §
Minors; MILTON EVANS, SR.; §
JOFERN FOLEY; ROSE FOLEY; §
Individually and a/n/f of §
SAMMIE JOE FOLEY, a Minor; §
SAMMY LEE FOLEY; JOANN T. §

FRANCO, Individually and a/n/ §
f of JUAN MANUEL FRANCO, §
JAMES MATTHEW FRANCO, §
and AARON MOSES FRANCO, §
Minors; PABLO G. FUENTES, §
SR. a/n/f of PAUL FUENTES, §
JR., JOE LEE FUENTES, and §
AMANDA FUENTES, Minors; §
BRIAN CRAIG GABRYSCH; §
EDWARD W. GABRYSCH, §
Individually and a/n/f of §
JEREMY DUANE GABRYSCH, a §
Minor; GLORIA GABRYSCH; §
ERNESTINA D. GAMEZ, §
Individually and a/n/f of §
JENNIFER LEA GAMEZ and §
MARK ANTONIO GAMEZ, §
Minors; ADELL B. GARCIA; §
ANDREA Z. GARCIA, §
Individually and a/n/f of §
ANDRES GARCIA, JR., a Minor; §
ANDRES M. GARCIA; §
CIPRIANO GARCIA, JR.; §
DENICE MICHELLE GARCIA, §
Individually and a/n/f of §
AMANDA GLENN, MARK §
GLENN and KASSIE GLENN, §
Minors; FIDEL M. GARCIA; JOE §
DAVID GARCIA; MARGARET §
ANN GARCIA; RAMONA C. §
GARCIA, as Representative of §
the Estate of JOSE A. GARCIA, §
Deceased; MARTIN GARCIA; §
MATILDE M. GARCIA, §
Individually and a/n/f of §
VERONICA A. GARCIA, §

LETICIA M. GARCIA, and §
VANESSA GARCIA, Minors; §
REBECCA GARCIA a/n/f of §
CASANDRA GARCIA and RENE §
GARCIA, JR., Minors; RENE §
GARCIA; VENUS LOVE §
GARCIA, Individually and a/n/f §
of JASYLE SELYSTI GARCIA, a §
Minor; VIRGINIA MARY §
GARCIA; ISAIAH GARLEY; §
ANGELMIRA MALDONADO §
GARZA; CLARA GARZA, §
Individually and a/n/f of RAUL §
GARZA, III and JOE DANIEL §
GARZA, Minors; DELIA L. §
GARZA a/n/f of DANIELLA E. §
GARZA, a Minor; GEORGE E. §
GARZA, JR., Individually and §
a/n/f of GEORGE GARZA, III, a §
Minor; LINDA B. GARZA, §
Individually and a/n/f of §
BRIAN A. GARZA, STEPHANIE §
LYNN GARZA, and NICHOLAS §
LEE GARZA, Minors; PATRICIA §
ALICE GARZA, Individually and §
a/n/f of ERNEST MATTHEW §
AGUIRRE, a Minor; PAULINE §
GARZA; RICHARD G. GARZA; §
SANTOS VILLEGAS GARZA; §
PEGGY J. GILMORE, §
Individually and as §
Representative of the Estate of §
GEORGE O. HERMES, Deceased; §
DAVID GOMEZ; RACHEL ANN §
GOMEZ, Individually and a/n/f §
of BRITTANY MARIE GOMEZ, a §

Minor; REBECCA ANN GOMEZ; §
ANGELITA GONZALES; DAVID §
SCOTT GONZALES; EDUARDO §
F. GONZALES; ELENA §
GONZALES; ELVIRA §
GONZALES; GONZALO ROCHA §
GONZALES; IDA MARIE §
GONZALES a/n/f of ASHLEY §
GONZALES and RYAN §
GONZALES, Minors; JOE §
GONZALES, JR.; LEONARDO G. §
GONZALES; MANUEL §
GONZALES, JR. a/n/f of §
CHRISTOPHER A. GONZALEZ, §
a Minor RAMON GONZALES, §
JR; RUTH LYNN GONZALES, §
Individually and a/n/f of §
AMANDA LYNN TEMPLE, a §
Minor; SYLVIA ANN §
GONZALES, Individually and §
a/n/f of SAN JUANITA §
GONZALES, JOE PATRICK §
GONZALES, RAMON §
GONZALES, DEBRA DENISE §
GONZALES, and ESMEREGILDA §
SOLIZ, Minors; VENANCIO §
GONZALES; WANDA FAY §
GONZALES, Individually and §
a/n/f of AMANDA L. §
GONZALES, ANGELICA N. §
GARZA, and KRISTIE A. §
GARZA, Minors; LUCINDA §
GRIFFITH, Individually and §
a/n/f of PAUL D. GRIFFITH §
and PETER F. GRIFFITH, §
Minors; PATRICK DEANE §

GRIFFITH; ARTURO §
GUTIERREZ; JESUSA GUERRA §
GUTIERREZ, Individually, as §
Representative of the Estate of §
GILBERT MENDOZA, Deceased, §
and a/n/f of GILBERT M. §
MENDOZA, DANIEL §
MENDOZA, and MARCUS §
CARDONA, Minors; AMY N. §
HADWIN, Individually and §
a/n/f of ASHLEY NICOLE §
HADWIN, a Minor; EDWARD J. §
HALL; SYLVIA M. HALL, §
Individually and a/n/f of §
EDWARD J. HALL, II, CRYSTAL §
V. HALL, and RYAN L. HALL, §
Minors; HAVEN P. HARROD; §
MARY HARROD; GEORGE A. §
HERMES, Individually and §
a/n/f of WESLEY WADE §
HERMES, a Minor; DOMINGA §
HERNANDEZ, Individually and §
a/n/f of JULIAN ESQUIVEL, §
CRYSTAL A. HERNANDEZ, and §
JESUS YSIDRO HERNANDEZ, §
Minors; JERRY HERNANDEZ; §
ORALIA ALEMAN §
HERNANDEZ; RAFAELA §
VILLANUEVA HERNANDEZ, §
Individually and a/n/f of §
MATTHEW FRANK §
HERENANDEZ, a Minor; FRED §
G. HERRERA; MARY E. §
HERRERA, REMIGIO V. §
HERRERA; Individually and §
a/n/f of MIRIAM HERRERA, §

MISHAEL HERRERA, and LEAH §
MARIE HERRERA, Minors; §
EDUARDO HINOJOSA; MARY §
SUE HINOJOSA; JAMES W. §
HOLLYFIELD; CYNTHIA D. §
HUWE; ALICE M. JOHNSON; §
CHARLENE K. JOHNSON a/n/f §
of ASHLEY CHERIE BROWN §
and AMBER NICOLE BROWN, §
Minors; SANTOS R. JONES, SR.; §
DEBORAH KAY STROLENY §
KENNEDY, Individually and §
a/n/f of SAMANTHA LEIGH §
KENNEDY, JOHN ROBERT §
KENNEDY, and KATHERINE §
ELIZABETH KENNEDY, Minors; §
JOHN GUENTER KENNEDY; §
MINNIE R. KINNEY; PAUL T. §
KINNEY; JOHNNY CANTU §
LANDIN; RITA BERNAL §
LANDIN; ESTELLA LANE, §
Individually and a/n/f of §
D'ANN DELANEY LANE and §
JESSICA MARIE LANE, Minors; §
JACQUELYN K. LANE; JESSE E. §
LANE; MICHAEL W. LANG; §
ANTONIO LEAL; DEBORAH §
LEAL; EDWARD T. LEAL; §
GUADALUPE L. LEAL, §
Individually and a/n/f of JUAN §
LEAL, III, a Minor; JOSE LEAL, §
JR. a/n/f of KRYSTAL LEAL §
and AMELIA LEAL, Minors; §
JUAN M. LEAL, JR.; LARRY §
LEAL; GLORIA E. LEVRIE, §
Individually and a/n/f of §

MONICO LEVRIE, III, §
MATTHEW A. LEVRIE, and §
LISA M. LEVRIE, Minors; §
MONICO LEVRIE, JR.; §
CLAUDIA ANN LICONA; §
CONSUELO C. LICONA; §
EZEKIEL LICONA; HERMINIO §
G. LICONA; LESLIE LYNN §
LICONA; LORI LEE LICONA; §
MARIA C. LICONA; SALVADOR §
LICONA, SYLVIA LICONA, §
Individually and a/n/f of §
KRISTINA NICOLE LICONA,a §
Minor; CHARLES LOPEZ a/n/f §
of VICTORIA K. LOPEZ and §
MELISSA A. LOPEZ, Minors; §
DIANA M. LOPEZ, a/n/f of §
JOANNIE M. LOPEZ, JOHNNIE §
E. LOPEZ, and JAMES A. §
LOPEZ, Minors; EDDIE N. §
LOPEZ; VALENTIN G. LOPEZ; §
IRMA L. LUNA, Individually §
and a/n/f of PAULA §
BENAVIDEZ, a Minor; MARIA §
MACIAS, Individually and a/n/f §
of MARTIN MACIAS and §
GLORIA MACIAS, Minors; §
VALENTIN G. MACIAS; §
ROSEANNA MADRIGAL, §
Individually and a/n/f of §
JEREMY LEE MADRIGAL, §
JENNIFER ANN MADRIGAL, §
MELISSA MARIE MADRIGAL, §
and JULIO MADRIGAL, JR., §
Minors; JOSE C. MARIN, JR.; §
ANNA K. MARTIN; §

CHARLESTON F. MARTIN; §
DENNY CHARLES MARTIN; §
ELIZABETH ANN MARTIN, §
Individually and a/n/f of §
JESSICA L. MARTIN, BRITTANY §
S. MARTIN, and DOMINIQUE T. §
MARTIN, Minors; ANDREA L. §
MARTINEZ; ARMANDINA §
MARTINEZ, Individually and §
a/n/f of ROBERT MARTINEZ, §
JR. JEREMY MARTINEZ, and §
AMANDA MARTINEZ, Minors; §
LYDIA B. MARTINEZ, as §
Representative of the Estate of §
CLEMENTE MARTINEZ, §
Deceased; DANIEL MARTINEZ, §
JR.; DIANA MARTINEZ, §
Individually and a/n/f of §
TIMOTHY LEE MARTINEZ, a §
Minor; ELIAS MARTINEZ; §
GLORIA MARTINEZ, §
Individually and a/n/f of §
DANIEL ANGEL MARTINEZ, §
WALTER ADOLPH MARTINEZ, §
FELICIA A. DANIELLE §
MARTINEZ, and LAURA A. §
MARIE MARTINEZ, Minors; §
RAMON V. MARTINEZ; §
ROSANDO MARTINEZ a/n/f of §
ROBERTO MARTINEZ, a Minor; §
VERGIE MARTINEZ; GEORGE §
LUIS MEDINA; DELMA §
MEDRANO; ERNESTINA §
MEDRANO, Individually and §
a/n/f of REYNALDO §
MEDRANO, JR. and §

LEONARDO MEDRANO, §
Minors; GUADALUPE R. §
MEDRANO, Individually and §
a/n/f of RANDY MEDRANO, a §
Minor; JOSETTE MEDRANO; §
MARIA DELIA MEDRANO; §
RAMIRO MEDRANO; RENE §
MEDRINO; REYANLDO §
MEDRANO, SR.; RUBEN S. §
MEDRANO; RUBEN MEDRANO, §
JR., Individually and a/n/f of §
BRANDON MICHAEL §
MEDRANO, a Minor; DAVID §
MELCHOR; DEBORAH §
MELCHOR; ANTONIO §
MENDOZA, Individually, as §
Representative of the Estate of §
MARY MENDOZA SANCHEZ, §
Deceased, and a/n/f of §
REYNALDO SANCHEZ, JR. and §
ROLAND REY SANCHEZ, §
Minors; ELOISA T. MENDOZA, §
Individually and a/n/f of §
LETICIA GARZA, a Minor; §
EMETERIO MENDOZA; GARY §
MENDOZA; JUANITA RIVAS §
MENDOZA; JUANITA TREVINO §
MENDOZA, Individually and §
a/n/f of MARIA TIJERINA and §
JUANITA TIJERINA, Minors; §
MANUEL B. MENDOZA; §
MARINA GONZALES §
MENDOZA, Individually and §
a/n/f of GARY MENDOZA, JR., §
a Minor; ROBERT JAMES §
MENDOZA; SALLY O. §

MENDOZA; OSCAR MIKES, §
Individually and a/n/f of §
CHISTOPHER MIKES and §
MATTHEW MIKES, Minors; §
JAMES E. MILLER; CHARLES §
MIRELES; BARBARA A. §
MOLINA; CARMEN A. §
MOLINA; EDDIE MOLINA; §
GABRIEL MOLINA; IRMA LEA §
MOLINA, Individually and §
a/n/f of MICHAEL MARTIN §
MOLINA and MATTHEW §
MARTIN MOLINA, Minors; JOE §
LUIS MOLINA; VANESSA FAE §
MOLINA, Individually and a/n/ §
f of JESSICA D. LEBLANC, §
JOHNATHON C. MOLINA, and §
JOSHUA MOLINA, Minors; §
VIDAL V. MOLINA, JR.; LUCIA §
L. MORALES; RAQUEL §
MORALES; BELINDA LORI §
MORENO, Individually and §
a/n/f of ALEXIS MORENO, a §
Minor; BENITO P. MORENO; §
DELORES D. MORENO, §
Individually and a/n/f of §
ANNETTE FELISHA MORENO, §
BALTAZAR RICHARD §
MORENO, and OMAR §
MORENO, Minors; DIONICIA §
MORENO; ORALIA ALVAREZ §
MORENO, Individually and §
a/n/f of BOBBIE LYNN §
MORENO, a Minor; SEFERINA §
C. MORENO, Individually and §
a/n/f of NOE MORENO, JR. §

and SAMANTHA MORENO, §
Minors; FLORA P. MORIN; §
LARRY E. MORIN, Individually §
and a/n/f of JENNIFER MORIN §
and SHAWN MORIN, Minors; §
LEROY P. MORIN; MARTHA §
ANN MORIN; OSCAR P. §
MORIN; ROSANNA B. MORIN, §
Individually and a/n/f of AMY §
BARRIENTEZ, VERONICA §
MORIN and RAYLEE REYNA, §
Minors; SHERRY MORIN a/n/f §
of KRISTINE B. MORIN and §
EARL RYAN MORIN, Minors; §
ALEJO MUNIZ; PATRICIA §
MUNIZ, Individually and a/n/f §
of SEVERO JOSE MUNIZ, JR., a §
Minor; ERMA M. MUNOZ; JOE §
MUNOZ; JOE MUNOZ, JR.; §
MARGARET ANN MUNOZ; §
RUDOLFO ALANIZ MUNOZ, §
JR.; SULEMA MUNOZ, §
Individually and a/n/f of §
MICHELLE CHRISTINE §
MUNOZ, a Minor; ALICE §
NIETO, Individually and a/n/f §
of ASHLEY MARIE LANG, a §
Minor; DARLEEN OAKES; MIKE §
OCHOA, JR.; JUAN P. OLIVO, §
JR.; ANTONIO OLVEDA; §
OLIVIA SALINAS OLVEDA, §
Individually and a/n/f of §
AMANDA OLVEDA and §
ADRIANA OLVEDA, Minors; §
ARTURO OLVERA a/n/f of §
AUTURO OLVERA, JR., a Minor; §

REBECCA L. OSHEL, §
Individually and a/n/f of §
HENRY SAENZ, II, a Minor; §
JUAN A. PACHECO, §
Individually and a/n/f of §
PHYLLIS LEANN PACHECO §
and PRISCILLA ANN §
PACHECO, Minors; LEE §
PACHECO; MARIO PACHECO; §
SALLY MARIE PACHECO, §
Individually and a/n/f of §
SAMANTHA MARIE GARCIA, a §
Minor; TERESA PACHECO, §
Individually and a/n/f of §
NICHOLAS LEE PACHECO, a §
Minor; VIRGINIA PACHECO, §
Individually and a/n/f of §
ROBERT LEE PACHECO, a §
Minor; CONSEPCION SEPEDA §
PAIZ; LIBRANDO PAIZ; PAULA §
DELEON PAIZ, Individually and §
a/n/f of CHRISTINA MARIE §
PAIZ, a Minor; TRINIDAD PAIZ, §
SR.; RAFAEL PALACIOS; §
EDWARD PENA; IDA PEREZ; §
MARY CANTU PEREZ; §
KENNETH CHARLES PERKINS, §
Individually and a/n/f of §
BREANNA PERKINS and §
KENDRICK PERKINS, Minors; §
ANNA ELIZABETH PORRAS, §
Individually and a/n/f of §
DANA MICHELLE CLARK and §
MICHELLE ANN DUKE, Minors; §
PASCUAL B. PRIETO; CARMEN §
JOLENE PULLIN, Individually §

and a/n/f of STEFANIE §
DELEANE SUGARCK and §
CHEYENNE LEA PULLIN, §
Minors; DIANA LYNN PULLIN, §
Individually and a/n/f of §
BRANDLYN KAYE PULLIN, §
DEREK REID PULLIN and §
BRITTANY SHAE PULLIN, §
Minors; HENRY EDWIN §
PULLIN, JR.; HENRY EDWIN §
PULLIN, SR.; WALLACE RAY §
PULLIN; ELVIA PORRAS §
QUESADA; CAROLINA §
QUINTANILLA; IRMA §
QUINTANILLA, Individually §
and a/n/f of ROSALINDA §
QUINTANILLA, LEONARDO §
QUINTANILLA, and VERONICA §
QUINTANILLA, Minors; JUAN §
M. QUINTANILLA, JR.; JUAN §
MANUEL QUINTANILLA, SR.; §
DIANA S. RAMIREZ, §
Individually and a/n/f of §
JENNIFER RAMIREZ, ROBER §
FELIX RAMIREZ, JR., §
JACQUELYN RAMIREZ, §
KIMBERLY RAMIREZ, CRYSTAL §
RAMIREZ, and BRIAN §
RAMIREZ, Minors; HELEN §
MUNOZ RAMIREZ; JULIE A. §
RAMIREZ; MARIO RAMIREZ, §
a/n/f of MELINDA RAMIREZ, a §
Minor; MARTHA RAMIREZ; §
ROBERT M. RAMIREZ; §
ROSELLA MUNOZ RAMIREZ, §
Individually and a/n/f of §

MICHELLE PACHECO, a Minor; §
JOVITA REYNA; EDWARD §
RIOJAS; LETICIA ROJAS, §
Individually and a/n/f of RHEA §
ALANNA RIOJAS, CRYSTAL §
ROSE RIOJAS, BRITTNEY §
NATASHA RIOJAS, and AMBER §
NICOLE RIOJAS, Minors; LOUIS §
DONALD ROBERTS, §
Individually and a/n/f of §
JENNIFER LASHAE ROBERTS, a §
Minor; ALEJANDRO §
RODRIGUEZ; AMY MARIE §
RODRIGUEZ; ANDRES R. §
RODRIGUEZ; CONSTANCIA G. §
RODRIGUEZ, Individually and §
a/n/f of BRENDA JOY §
RODRIGUEZ, a Minor; §
DIONICIO RODRIGUEZ, JR.; §
GEORGE G. RODRIGUEZ; §
ISRAEL RODRIGUEZ, SR.; §
JANIE RODRIGUEZ, §
Individually and a/n/f of §
ALEJANDRO RODRIGUEZ, JR. §
and ASHLEY R. RODRIGUEZ, §
Minors; JENNIFER RODRIGUEZ, §
Individually and a/n/f of §
LYSANDRA RENAE §
RODRIGUEZ and ELODIA §
PADILLA, Minors; JOE GAITAN §
RODRIGUEZ; LINA V. §
RODRIGUEZ; MARIA LAMAR §
RODRIGUEZ, Individually and §
a/n/f of GABRIEL RODRIGUEZ, §
a Minor; MICHAEL ANTHONY §
RODRIGUEZ; NOELIA §

RODRIGUEZ, Individually and §
a/n/f of ISRAEL RODRIGUEZ, §
JR. and MARCUS P. §
RODRIGUEZ, Minors; ROBERTO §
GAUCERES RODRIGUEZ, §
Individually and a/n/f of §
ROBERT J. RODRIGUEZ, §
PAMELA ANN RODRIGUEZ, §
RYAN ERIE RODRIGUEZ, and §
BRANDON G. RODRIGUEZ, §
Minors; ROSALINDA §
RODRIGUEZ, Individually and §
a/n/f of ESPERANZA §
RODRIGUEZ, ANDRIANA §
RODRIGUEZ, and ELODIA §
RODRIGUEZ, Minors; ELIAS §
ROSALES, JR.; MARIA §
ROSALES, Individually and §
a/n/f of ELIAS ROSALES, III, §
LAURA ROSALES, LINDSEY §
ROSALES, and EMILIO §
ROSALES, Minors; IDA ROSE; §
STEVE ROSE; RUBY ANN §
ROSENBAUM, Individually and §
a/n/f of KEVIN ZAPATA, §
KIMBERLY ZAPATA, SANTOS §
DELEON, THOMAS JAY §
DELEON, and JASON RYAN §
DELEON, Minors; ISIDRO D. §
ROSSETT, JR.; ANGEL R. RUIZ; §
ESTELLA C. RUIZ, Individually §
and a/n/f of CRYSTAL RUIZ, a §
Minor; RICARDO RUIZ, SR.; §
RICARDO RUIZ, JR.; ALBERT §
SAENZ, JR., Individually and §
a/n/f of CRYSTAL SAENZ and §

ELIZABETH SAENZ, Minors; §
BERTHA SAENZ;. HENRY §
SAENZ a/n/f of SAMANTHA §
SAENZ, a Minor; JANIE SAENZ; §
JOE SAENZ; JUAN R. SAENZ; §
YOLANDA R. SAENZ, §
Individually and a/n/f of §
ALBERT M. SAENZ, III, a §
Minor; MARY JANE SALAZAR, §
Individually and a/n/f of §
STEPHANIE M. SALAZAR, a §
Minor; BENNIE A. SALINAS, JR. §
a/n/f of BENNIE SALINAS, III, §
a Minor; DANIEL SALINAS; §
MANUEL R. SALINAS, §
Individually and a/n/f of §
Representative of the Estate of §
DELORES B. SALINAS, §
Deceased; FELIX SALINAS; §
JUANITA R. SALINAS, §
Individually and a/n/f of §
OSCAR SALINAS, RICHARD §
SALINAS, and OLGA SALINAS, §
Minors; MARIA C. SALINAS; §
MARY SALINAS a/n/f of §
ALFRED L. VILLARREAL and §
SAUSHA MONIQUE SALINAS, §
Minors; RACHEL SALINAS; §
RICARDO SALINAS; ROBERT A. §
SALINAS; SEFERINA SALINAS; §
SUSANA NUNEZ SALINAS §
a/n/f of SUZETTE SALINAS, a §
Minor; RUBY ANN SANCHEZ, §
Individually and a/n/f of §
CRISTOBAL GARCIA, JR., §
CASSANDRA NICOLE GARCIA, §

GABRIEL DOMINIQUE §
GARCIA, and ASHLEY §
KRISTINE GARCIA, Minors; §
CHRISTOPHER SANDOVAL §
a/n/f of ASHLEY MORIN §
SANDOVAL, a Minor; ELIBERTO §
SANDOVAL; JUAN F. §
SANDOVAL; ODILIA §
SANDOVAL; GLORIA M. §
SANTIAGO, Individually and §
a/n/f of RUDY SANTIAGO, JR., §
VERONICA SANTIAGO, and §
ANTHONY SANTIAGO, Minors; §
RUDY SANTIAGO; HENRY J. §
SCHULTZ, III; SAUNDRA LEE §
SCHULTZ, Individually and §
a/n/f of HENRY J. SCHULTZ, §
IV, a Minor; STACEY LEE §
SCHULTZ, Individually and §
a/n/f of DARYN CHRISTIAN §
SCHULTZ and DEVYN C. §
SCHULTZ, Minors; JIMMY W. §
SELLERS, II; VICTOR SERNA; §
FELIX C. SERVANTEZ; ALLEN §
L. SHULAR, Individually and §
a/n/f of DOMINIQUE L. §
SHULAR; CHRISTOPHER L. §
SHULAR, Individually and a/n/ §
f of VICTORIA B. SHULAR, a §
Minor; T. V. SHULAR; ADAM §
M. SILVA; FRED S. SILVA a/n/f §
of CHRISTINA SILVA, FREDDY §
SILVA, JACINTA SILVA and §
CELENA SILVA, Minors; LORI §
ANN SMART a/n/f of §
MICHELLE E. SMART, a Minor; §

EDNA L. SMITH a/n/f of §
CHARLES A. SMITH and §
EMERY SMITH, Minors; ELDA §
C. SMITH, Individually and §
a/n/f of MATTHEW E. SMITH §
and ANDREA CAROL SMITH, §
Minors; EDNA SMITH, as §
Guardian of LORI ANN SMITH, §
non compos mentis, and a/n/f §
of CHARLES A. SMITH and §
EMERY SMITH, Minors; §
PATRICK T. SMITH, Individually §
and a/n/f of JORDAN PATRICK §
SMITH, a Minor; LUIS G. SOLIS; §
SANTIAGO G. SOLIS, SR.; §
MARY LOU L. SOLIZ, §
Individually and a/n/f of §
SONNY L. SOLIZ, JAMES L. §
SOLIZ, GEORGE L. SOLIZ, LUIS §
L. SOLIZ, and ANDRIANA L. §
SOLIZ, Minors; DEMETRIO §
SOSA a/n/f of SANTIAGO A. §
SOSA and DEMETRIO SOSA, §
JR., Minors; DANIEL G. §
SOTELLO; JOANN SOTELLO, §
Individually and a/n/f of JESSE §
MICHAEL SOTELLO; JOHNNY §
J. SOTELLO; JOHNNY C. §
SOTELLO; LINDA SOTELLO, §
Individually and a/n/f of SAUL §
SOTELLO and JUSTIN R. §
SOTELLO, Minors; MARTHA E. §
SOTELLO, Individually and §
a/n/f of VANESSA MARIE §
SOTELLO, a Minor; JULIE DIAZ §
SOTO; ROBERTO O. SOTO, §

Individually and a/n/f of §
KATHERINE SOTO, a Minor; §
CLARA JEAN STRAUSE; §
RONNIE STRAUSE; DAVID L. §
STROLENY, Individually and §
a/n/f of NICOLE LEEANN §
STROLENY and RYAN §
MICHAEL STROLENY, Minors; §
JACKY ANN STROLENY, §
Individually and a/n/f of §
NATHAN LEE STROLENY, §
BLAKE ANDREW STROLENY, §
and SHAWN TIMOTHY §
STROLENY, Minors; JAMES §
TIMOTHY STROLENY; MARY K. §
STROLENY; JUAN BENITIZ §
SUNIGA; JUANITA E. SUNIGA; §
ERMA G. TEJADA Individually §
and a/n/f of RONALD TEJADA, §
JR. and ERIC JUSTIN TEJADA, §
Minors; HILDA ANN TEJADA, §
Individually and a/n/f of §
JOSHUA BLAKE TEJADA, a §
Minor; JAMES M. TEJADA; §
ROBERT C. TEJADA, §
Individually and a/n/f of §
SAMANTHA TEJADA, a Minor; §
RONALD C. TEJADA; SANDRA §
M. TEJADA; AURORA INEZ §
TIJERINA; JESSICA V. TIJERINA, §
Individually and a/n/f of §
CRYSTAL HALEY TIJERINA, a §
Minor; RENEE MARIE §
TIJERINA, Individually and §
a/n/f of ADAM CHRISTOPHER §
TIJERINA, a Minor; ALFREDO §

TORRES; ARNULFO C. TORRES; §
CELIA S. TORRES; CYNTHIA §
TORRES, Individually and a/n/f §
of MAURO TORRES, III, §
MCKENZIE K. TORRES, and §
JUANITA G. TORRES, Minors; §
DELMA TORRES, Individually §
and a/n/f of LUCAS §
MATTHEW ALVEAR, a Minor; §
FELICITA TORRES a/n/f of §
JENNIFER TORRES, ISRAEL §
TORRES, REMIJIO HERRERA, §
ROSE M. TORRES, and §
ESTELLA TORRES, Minors; §
GLORIA TORRES; GUADALUPE §
LOUIS TORRES; JOHN M. §
TORRES; JUANITA TORRES, §
Individually and a/n/f of §
ERNESTO MIRANDA, JR., a §
Minor; LAURA TORRES; §
MANUEL TORRES; MAURO §
TORRES, JR.; PEDRO TORRES, §
SR., Individually and a/n/f of §
PEDRO TORRES, JR., a Minor; §
ROSARIO B. TORRES, §
Individually and a/n/f of §
ERNESTO B. TORRES, ELISA B. §
TORRES, and ARNULFO B. §
TORRES, II, Minors; ABEL §
TREVINO; IRENE M. TREVINO; §
OLGA A. TREVINO; JOSE §
MIGUEL TURRUBIARTES; §
GABRIEL J. VALDEZ, §
Individually and a/n/f of §
ESTHER E. VALDEZ, a Minor; §
MARTINA GONZALES VALDEZ §

a/n/f of ROBERT VALDEZ, JR. §
and ALMA LINDA VALDEZ, §
Minors; MARY H. VALDEZ, §
Individually and a/n/f of §
ESTHER E. VALDEZ, a Minor; §
DOMINGO A. VARGAS; SOFIA §
G. VARGAS; OFILIA VASQUEZ §
GONZALES, as Representative §
of the Estates of MARGARITA §
O. VASQUEZ, Deceased, and §
TOMAS VASQUEZ, Deceased; §
GUADALUPE VELASQUEZ §
a/n/f of RAUL VELASQUEZ, §
JR., a Minor; JOSEFINA §
VELASQUEZ; LAURIE TERESA §
VELASQUEZ; GLORIA D. §
VENECIA; AMADOR R. VIDAL; §
ADAN VILLANEUVA; §
ANSELMA Y. VILLANUEVA, §
Individually and a/n/f of MARY §
E. VILLANUEVA, JOANNA §
VILLANUEVA, LEONARD A. §
VILLANUEVA, and ROSE §
MARIE VILLANUEVA, Minors; §
AURORA VILLANUEVA, §
Individually and a/n/f of JOEL §
VILLANUEVA, a Minor; §
BRENDA T. VILLANUEVA, §
Individually and a/n/f of §
CRYSTAL L. VILLANUEVA and §
FRANK VILLANUEVA, JR., §
Minors; CHRISTY SUE §
VILLANUEVA; DONNA §
VILLANUEVA, Individually and §
a/n/f of SAVANNAH §
RODRIGUEZ, a Minor; FRANK §

A. VILLANUEVA; IRMA §
VILLANUEVA a/n/f of §
PAMELA ANN VILLANUEVA §
and AMY NICOLE §
VILLANUEVA, Minors; JESUS §
VILLANUEVA; JESUSA §
VILLANUEVA; LAURA §
VILLANUEVA; MARCOS §
VILLANUEVA; MIGUEL C. §
VILLANUEVA; MIGUEL §
VILLANUEVA; NOEL F. §
VILLANUEVA; ALFREDO G. §
VILLARREAL, Individually and §
a/n/f of SHANA VILLARREAL, §
ALFRED L. VILLARREAL, and §
ALFREDO G. VILLARREAL, §
Minors; BILLY VILLARREAL; §
ERLINDA VILLARREAL a/n/f §
of ROXANNE VILLARREAL, §
VALERIE VILLARREAL and §
KRYSTAL VILLARREAL, Minors; §
LOUISA R. VILLARREAL; §
LUCIANO VILLARREAL; RAUL §
VILLARREAL; ROBERT §
VILLARREAL, Individually and §
a/n/f of BRYAN KEITH §
GUTIERREZ, a Minor; §
THEODORE VILLARREAL §
RUDY VILLEGAS; PATRICK §
WILLIAMS; ROBERTO YBANEZ; §
EMELIA H. YBARRA; JOE §
YBARRA; JOEY YBARRA; §
PEDRO G. ZAMBRANO; PEDRO §
J. ZAMBRANO; ROSARIO §
ZAMBRANO, Individually and §
a/n/f of GABRIEL RUBEN §

MEDRANO, a Minor; TRINIDAD §
M. ZAMBRANO; AMADEO R. §
ZAPATA, Individually and a/n/f §
of KEVIN ZAPATA and §
KIMBERLY ZAPATA, Minors; §
ANNA MARIE ZAPATA, §
Individually and a/n/f of §
HECTOR ZAPATA, JR., LISA M. §
ZAPATA, and PRISCILLA A. §
ZAPATA, Minors; GLORIA R. §
ZAPATA, Individually and a/n/f §
of SAMUEL ZAPATA, JR. and §
RODERICA ZAPATA, Minors; §
GUADALUPE ZAPATA; §
HECTOR ZAPATA; JANIE §
ZAPATA; OMERO ZAPATA; §
RUBEN ZAPATA; SAMUEL C. §
ZAPATA; and VIDAL MOLINA §
ZUNIGA. §
§
PLAINTIFFS §
§
VS. §
§
BROWN & ROOT, INC., and §
CHEVRON CORPORATION §
§
DEFENDANTS §

NOTICE OF REMOVAL

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COME NOW, Defendants, Brown & Root, Inc. and Chevron Corporation ("Defendants") and respectfully show this Court:

1. Federal Jurisdiction is Proper Under Price-Anderson Act. Plaintiffs in this lawsuit are making allegations

about alleged adverse effects on their health and safety resulting from activities within the Western District of Texas. Plaintiffs claim damage from alleged exposure to "uranium mining activities," an integral part of the nuclear industry. The nuclear industry is closely regulated, to the extent that Congress included specific jurisdictional and removal grants within the Nuclear Energy Act, found at Chapter 23 of Title 42, Public Health and Welfare, of the United States Code. Congress's specific jurisdictional and removal statute is included in the Price-Anderson Act, which is a subsection of the Nuclear Energy Act, codified at 42 U.S.C. § 2210. Section 2210(n)(2) provides that "[w]ith respect to any public liability action arising out of or resulting from a nuclear incident, *the United States district court* in the district where the nuclear incident takes place . . . *shall have original jurisdiction.*" (emphasis added). The Act further provides "[u]pon motion of the defendant . . . any such action pending in any State court . . . *shall be removed to the United States district court having venue under this subsection.*" *Id.* (emphasis added).[1]

The allegations made by Plaintiffs fall within the purview of the Price-Anderson Act because the claims amount to a "public liability action" asserting a "nuclear incident," both of which terms are specifically defined in the Nuclear Energy Act. A "public liability action" is defined by 42 U.S.C. § 2014(hh) to be "any suit asserting public liability." "Public liability" is defined by 42 U.S.C. § 2014(w) to be "any legal liability arising out of or resulting from a nuclear incident." "Nuclear incident" means "any occurrence . . . causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). The term "source material" includes uranium (42 U.S.C. § 2014(z)), which Plaintiffs allege was being mined by Defendants.

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[1] Removal is *not* made pursuant to 28 U.S.C. § 1441, which provides that "[e]xcept as otherwise expressly provided by Act of Congress" removal is proper to "the district and division embracing the place where [the state lawsuit] is pending." Instead, Price-Anderson calls for removal to the district "where the nuclear incident takes place." It is for this reason that this matter has been removed to this Court instead of the Southern District, Galveston Division, in which, upon information and belief, no Plaintiffs reside and no "mining activity" occurred.

In their Original Petition, Plaintiffs have alleged, among other things, that:

> This suit is necessary because of Defendants' uranium mining activities. . . . Such conduct was the proximate cause of considerable personal injury occurring to the Plaintiffs herein.

Plaintiffs' Original Petition at 28. Because Plaintiffs have alleged a "public liability action" arising from a "nuclear incident," jurisdiction is therefore proper in federal court under Section 2210(n)(2) of the Price-Anderson Act. Plaintiffs cannot allege exposure to uranium and uranium mining activities without invoking federal jurisdiction, regardless of their effort to allege only state claims.

2. *Related Cases.* This is not the first case like this filed by Plaintiffs' counsel. On behalf of other plaintiffs, on August 31, 1995, Plaintiffs' counsel filed a lawsuit styled *Rebecca Garcia, et al. v. Conoco, Inc., et al,* which is

presently pending in the United States district court for the Southern District of Texas, McAllen Division, bearing Civil Action No. M-95-340.[2] In *Garcia*, there are more than 500 named plaintiffs (minors included) and 96 named defendants (some of which remain unserved.) In *Garcia*, Plaintiffs' counsel filed a Motion to Remand which was denied. *See* Paragraph 4 *infra*.

On December 14, 1995, on behalf of essentially the same Plaintiffs who have brought this lawsuit, Plaintiffs' counsel filed a lawsuit styled *Helen Leal Alaniz, et al. v. Chevron Corporation*, bearing Civil Action No. G-95-776, in the United States District Court for the Southern District of Texas, Galveston Division. Plaintiffs have requested no issuance of summons or citation in *Alaniz*. Of note, *Alaniz* has now been pending more than 120 days without such request, in violation of Fed. R. Civ. P. 4(m).

To the knowledge of the undersigned, this *Acuna* lawsuit is the third lawsuit Plaintiffs' counsel has filed concerning an alleged "nuclear incident" relating to uranium mining activities in Texas. All of the *Alaniz* plaintiffs are now plaintiffs in this lawsuit, which, as stated above, was recently filed without any effort to serve the prior lawsuit.

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[2] At a hearing scheduled on May 10, 1996, Judge Hinojosa indicated that he will consider transferring *Garcia* from McAllen to another venue. The next hearing is scheduled in *Garcia* on June 17, 1996. Defendants will request transfer to San Antonio under Price-Anderson because the alleged "nuclear incident" occurred, if at all, in the Western District. Defendants believe Plaintiffs here are alleging the same "nuclear incident" alleged in *Garcia*.

3. *Related Rulings.* On April 16, 1996, Judge Ricardo Hinojosa denied Plaintiffs' Motion to Remand in the *Garcia* action. A true and correct copy of the docket sheet entry reflecting the Court's order is attached hereto as Exhibit "A."

4. *Venue Lies "Where the Nuclear Incident (Took) Place."* Section 2210(n)(2) of the Price Anderson Act provides both the jurisdictional basis for removal and the venue rule applicable to this lawsuit. Venue lies "in the United States district court in the district where the nuclear incident takes place." 28 U.S.C. § 2210(n)(2). Though Plaintiffs' pleading is not specific as to where the alleged "mining activities" took place, Plaintiffs have sued only Brown & Root and Chevron Corporation. Brown & Root has no uranium mining operations. Though Chevron Corporation has not itself engaged in uranium mining, it is affiliated with Chevron U.S.A., Inc. which has held a radioactive material license (no. L02402) relating to the Panna Maria Project located in Karnes County. Coincidentally, that same Panna Maria facility was identified by Plaintiffs' attorney in the *Garcia* lawsuit as one of three Karnes County facilities about which his clients complain.[3] Upon information and belief, Plaintiffs are alleging a "nuclear incident" which, if it occurred at all, occurred at or near the Panna Maria Project in Karnes County. Karnes County is within the Western District of Texas, San Antonio Division, and as such both jurisdiction and venue are proper in this Court.

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[3] The front page and the relevant page of Plaintiffs' initial disclosures in *Garcia* are attached hereto as Exhibit B.

5. *Timeliness of Removal.* This Notice of Removal is timely in accordance with 42 U.S.C. § 2210(n)(2), which states that "a petition for removal shall be filed within the period provided in section 1446 of Title 28." Section 1446(b) requires that notice of removal be filed within 30 days after receipt, "through service or otherwise," of the original or a copy of the initial pleading. Although Plaintiffs' Original Petition has not been served upon Defendants, this Notice of Removal is being filed within 30 days of receipt of a copy of the initial pleading, which was telecopied by Plaintiffs' counsel to the undersigned on April 26, 1996.

6. *Required Attachments.* Plaintiff filed this lawsuit in the 56th Judicial District Court, Galveston County, Texas on April 26, 1996. It was issued Cause No. 96-CV0417. A true and correct copy of the Original Petition, which, until removal, was the only pleading on file in the underlying matter, is attached as Exhibit "C." There are no orders signed by the state judge in the underlying matter. A true and correct copy of the state court docket sheet in the underlying matter is attached as Exhibit "D."

7. *Notice to State Court.* Notice of Removal to Federal Court will be timely and properly made to the state court. A copy of the Notice of Removal to Federal Court is attached hereto as Exhibit "E."

8. *Amount in Controversy.* Under the Price-Anderson Act, jurisdiction is proper regardless of the amount in controversy. 42 U.S.C. § 2210(n)(2). Notwithstanding this provision, Plaintiffs seek damages exceeding, exclusive of interest and costs, the sum of fifty-thousand dollars

($50,000.00). See Plaintiffs' Original Petition, Paragraph VIII at 30.

WHEREFORE, based on the foregoing, Defendants respectfully urge this Court to acknowledge the removal of this action from the 56th Judicial District Court, Galveston County, Texas, to the United States District Court for the Western District of Texas, San Antonio Division.

Respectfully submitted,

McGINNIS LOCHRIDGE &
KILGORE, L.L.P.
John R. Breihan
Robert C. Wilson
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(512) 495-6108
(512) 495-6093 FAX

By: John R. Breihan
John R. Breihan
State Bar No. 02947675

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Removal has been served upon all counsel of record, including the following counsel, via certified mail, return receipt requested, on the 24th day of May, 1996.

Bruce L. Jamison
1001 Texas Avenue
Suite 405
Houston, Texas 77002

/s/ John R. Breihan
John R. Breihan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA, et al	§ §	CIVIL CASE NO. SA 96 CA 0543
VS.	§ §	JURY TRIAL DEMANDED
BROWN & ROOT, INC. and CHEVRON CORPORATION	§ § §	(Filed Jun. 21, 1996)

PLAINTIFFS' MOTION TO REMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiffs, CRECENSIO ACUNA, ET AL, and file this their Motion to Remand, and in support thereof would respectfully show unto this Honorable Court the following:

I.

PROCEDURAL AND FACTUAL BACKGROUND

On April 26, 1996, Plaintiffs, filed suit in the 56th Judicial District Court of Galveston County, Texas. That suit was premised entirely on state law causes of action and did not invoke any federal cause of action or federal subject matter jurisdiction.

Although the removal statutes specify that removal is only proper to the federal court in the district and division where the case was filed, on May 24, 1996, Defendants improvidently removed this case to this Court under the provisions of 42 U.S.C. §2210(n)(2). However, this Court does not have subject matter jurisdiction pursuant to 42 U.S.C. §2210(n)(2), or any other federal law or statute.

II.

ARGUMENT

This Court does not have jurisdiction to hear this action, because complete diversity between the parties does not exist under 28 U.S.C. § 1332 and because there is no federal subject matter jurisdiction. No cause of action in this matter as stated in Plaintiffs' Original Petition, arises under federal law, and Plaintiffs have not asserted a claim under federal law.[1] As such, there is no jurisdiction in this Court based upon federal question.

A. No subject matter jurisdiction

The burden to proof always is on the party seeking to invoke the jurisdiction of the Federal Courts. ***Mas v. Perry***, 849 F.2d 1396 (5th Cir. 1974) ***cert denied*** 95 S.Ct. 74, 419 U.S. 842, 42 L.Ed.2d 70.[2] Here, since Defendants seek to remove this case to Federal Court, they have the burden to prove that federal subject matter jurisdiction exists. *Id.* Otherwise, this Court has no jurisdiction and the case must be remanded for lack of subject matter jurisdiction. 28 U.S.C. §1447.

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[1] The presence or absence of federal jurisdiction is governed by the "well pleaded complaint rule," which provides that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425, 2429 (1987). Clearly, there is no federal question presented on the face of Plaintiffs' Petition, and none is claimed by Defendants.

[2] In ruling on the remand motion, the Court will determine removability from the complaint as it existed at the time of removal, together with the removal notice. *In re Carter*, 618 F.2d 10[illegible]3 (5th Cir. 1980)

Once Plaintiffs have challenged the Court's jurisdiction by denying it specifically in a Motion to Remand, the burden of proof is upon the Defendants invoking the Federal Court jurisdiction to come forward with evidence to prove the allegations contained in the Notice of Removal. ***McNutt v. General Motors Acceptance Corp.***, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); ***B. Inc. v. Miller Brewing Co.***, 663 F.2d 545, 549 (5th Cir. 1981). Plaintiffs herein specifically deny the validity of Defendants' bases for removal which places the burden on Defendants to establish that removal was proper. ***Id.***

B. Case removed to wrong federal court

Defendants improvidently removed this case from the 56th Judicial District Court of Galveston County, Texas, pursuant to 42 U.S.C. §2210(n)(2). However, removal is governed by 28 U.S.C. § 1446, entitled "Procedure for Removal", which requires that:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court **shall file in the district court of the United States for the district and division within which such action is pending** a notice of removal . . .

28 U.S.C. § 1446(a) (emphasis supplied).

Accordingly, removal was improper and this case should have been remanded, or alternatively transferred to the Southern District of Texas, Galveston Division.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Honorable court remand this case to the 56th Judicial District Court of Galveston County, Texas. Alternatively, Plaintiffs request this Court be transfer to the Southern District of Texas, Galveston Division.

Respectfully submitted,

JAMISON LEGAL CENTER

/s/ Bruce L. Jamison
Bruce L. Jamison
TSB# 10561500
T. Bryan Akin
TSB# 00960100
Charles J. Argento
TSB# 01301750
1001 Texas Avenue, Suite 1400
Houston, Texas 77002
(713) 222-9987 – Office
(713) 224-6604 – Facsimile
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Defendants, CHEVRON CORPORATION and BROWN & ROOT, INC., was contacted and are opposed to this Motion to Remand.

/s/ Bruce L. Jamison
BRUCE L. JAMISON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Motion to Remand has been forwarded to all counsel of record pursuant to Rules 5(a), (b) and (d) of the Federal Rules of Civil Procedure on this the 19th day of June, 1996, addressed as follows:

John R. Breihan McGINNIS, LOCHRIDGE & KILGORE, L.L.P. 1300 Capitol Center 919 Congress Avenue Austin, Texas 78701 [counsel for Chevron Corporation and Brown & Root, Inc.]	VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED #P 478 362 516

/s/ Bruce L. Jamison
BRUCE L. JAMISON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA, et al., Plaintiffs,	* * * *	CIVIL NO. SA-96-CA-543
v.	*	(Filed April 11, 1997)
BROWN & ROOT, et al., Defendants.	* * *	

ORDER

In an Order dated January 29, 1997, the Court granted a motion to extend the scheduling order deadlines and directed the parties to file a joint advisory containing proposed scheduling order deadlines. The Court sought input from counsel as to the scheduling order deadlines because this is a mass-tort case involving over 800 plaintiffs. Plaintiff suggested that the Court use a scheduling order that is used for "normal" cases, whereas the defendant requested that the Court impose what is certainly an atypical scheduling order. The defendants' proposed scheduling order, ***Joint Advisory Report***, Exh. B, establishes an early deadline for plaintiffs to establish a prima facie case of causation using expert reports before defendants would be subjected to the expense of discovery. As this type of scheduling order has been used in other mass-tort cases, the Court view its use appropriate in this case.

Discussion

The Court directed the parties to provide the Court with briefs as to the merits of using the defendants' proposed scheduling order. The plaintiffs contend that it would work a great injustice on them to be required to produce expert reports to establish a prima facie case of causation for personal injury and property damage claims without the benefit of disclosure and discovery. Plaintiffs contend that: (1) the defendants' suggested scheduling order does not comport with the standard adopted by the Fifth Circuit for handling mass-tort cases; and (2) a better alternative would be for the Court to exercise its discretion to conduct discovery as to a certain number of plaintiffs and proceed to trial with such finite number of plaintiffs.

Plaintiffs cite to only one case, ***In re Fibreboard Corp.*** ("***Fibreboard***"), to support their position. 893 F.2d 706 (5th Cir. 1990). In ***Fibreboard***, the Fifth Circuit issued a writ of mandamus to vacate a pretrial order that consolidated 3,031 asbestos cases for trial in the Eastern District of Texas. The pretrial order at issue separated the case into three phases: (1) Phase I would be the trial of common defenses and punitive damages; (2) In Phase II, before the same jury, certain cases would be fully tried and the jury would decide the total, or "omnibus" liability to the class[1]; and (3) in Phase III, any awarded damages would be distributed to the members of the class. *Fibreboard*, 893 F.2d at 707. The defendants in *Fibreboard* argued that the disputed pretrial order deprived them of their right to "one-to-one adversarial engagement" protected under the Constitution. The *Fibreboard* Court agreed with the defendants and held that the disputed pretrial order would violate federal and state law.

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[1] Under the disputed pretrial order, a representative group of cases would number 41, but only eleven cases would actually be fully tried. Although the parties could offer any evidence about the other thirty "illustrative plaintiffs" in the group of 41, the results of the trial would still require extrapolation to the 2,990 remaining plaintiffs. ***Fibreboard***, 893 F.2d at 711 & n.5.

It is apparent that *Fibreboard* does not support the plaintiffs' argument for a "representative trial" because the holding provides a reaffirmation of the right to one-to-one adversarial process. Plaintiffs' suggestion that the Court allow discovery as to a certain number of plaintiffs and proceed to trial with that finite number of plaintiffs is simply not allowed under *Fibreboard*. The plaintiffs' claim of denial of due process as a result of not being able to conduct discovery before making a prima facie case using expert reports does have a measure of support in *Fibreboard*:

> Trials can vary greatly in their procedures, such as numbers of jurors, the method of jury instruction, and a large number of other ways. There is a point, however, where cumulative changes in procedure work a change in the very character of a trial. Significantly, changes in "procedure" involving the mode of proof may alter the liability of the defendants in fundamental ways. We do not suggest that procedure becomes substance whenever outcomes are changed. Rather, we suggest that changes in substantive duty can come dressed as a change in procedure.

Fibreboard, 893 F.2d at 711. Although the Court is mindful that a procedural change could create a substantive change in duty, it appears that the particularities of mass-tort cases require a balance of the respective burdens placed on the parties. The ***Fibreboard*** Court indicated in its directive to the district court that such a balance is necessary:

> We encourage the district court to continue its imaginative and innovative efforts to confront these cases. We also caution that defendants are obligated to cooperate in the common enterprise of obtaining a fair trial.

Fibreboard, 893 F.2d at 712. Upon consideration of the burdens placed on the respective parties, the Court believes that use of the defendants' proposed scheduling order would be fair.

In assessing the fairness of using the defendants' proposed scheduling order, the Court is guided by the decisions of other courts that have struggled with a similar issue in mass-tort cases. In ***Renaud v. Martin Marietta Corp.,*** the court required the plaintiffs to present their prima facie case of causation at an evidentiary summary judgment hearing. 749 F.Supp. 1545, 1548 (D.Colo.1990), ***aff'd,*** 972 F.2d 304 (10th Cir.1992). Similar to the requirement of the defendants' proposed scheduling order in this case, the plaintiffs in ***Renaud*** were required to show that they were exposed to contaminants at levels sufficient to cause the injuries they alleged. The ***Renaud*** Court granted summary judgment because the plaintiffs' evidence was insufficient to meet their prima facie burden. ***Id.*** at 1555. The holding in ***Renaud*** favors the use of the defendants' proposed scheduling order in this case.

In several Texas mass-tort cases, courts have required a preliminary showing of causation by plaintiffs before allowing the case to proceed. Defendants have provided copies of orders issued in those cases. ***Def. Brief,*** Exh. 2-7. Each one of the orders in the Texas cases requires that the plaintiffs establish a prima facie case of causation as a preliminary hurdle in such cases. Notably, in two of the orders, discovery was stayed, ***Def. Brief,*** Exh. 3, 4, and in one order, the close of discovery was set for a date over nine months after the plaintiffs were required to establish a prima facie case of causation, ***Def. Brief,*** Exh. 2. These cases suggest that the use of the defendants' proposed scheduling order is fair.

The balancing of the parties' competing interests by various courts in mass-tort cases has resulted in the requirement of a prima facie showing of causation to justify the enormous expense involved in defending such a case. In ***Able Supply Co. v. Moye,*** the Texas Supreme Court granted a writ of mandamus and directed the trial court to grant the defendants' motion to compel, which would require the plaintiffs to identify the physician that linked their injuries to the defendants' products. 898 S.W.2d 766 (Tex.1995). The ***Moye*** Court concluded that "[r]equiring the plaintiffs to answer an interrogatory linking each plaintiff's injuries with a particular product will simplify the case, streamline costs to both plaintiffs and defendants, conserve judicial resources, and aid the trial court in preparing a plan for trial of these cases." ***Id.*** at 898 S.W.2d at 771. In a case citing ***Moye,*** the Supreme Court again stressed the waste involved in handling a mass-tort case as if it were a "typical" case: "Unfortunately, in this era of complex multi-party litigation, defendants must take a hard look at whether they can afford to defend a case regardless of the merits." ***SCR Ltd. v. Link***, 925 S.W.2d 591, 598 (Tex.1996) (J.Gonzalez concurring). The ***Link*** case noted that, although the ***Moye*** case had been pending for more than eight years, the plaintiffs were never required to establish causation, yet many defendants felt compelled to settle for millions of dollars to cut their losses. ***Id.*** This Court shares those concerns.

It is not simply the waste of resources that motivates the Court to use the defendants' proposed scheduling order. First, information regarding the operations of the defendants in the highly regulated industry of uranium mining is a matter of public record. Disclosures have ostensibly been made to federal and state authorities by the defendants concerning the nature and amount of uranium mining products or by-products that have been handled. As part of the regulatory process, numerous inspections have been made of the mining operations. Defendants have provided evidence of a report conducted by the Texas Department of Health that summarizes its findings in a 1991 surveillance of facilities in Texas that have a potential for elevated radiation levels or the release of radioactive substances into the environment. ***Def. Brief,*** Exh. A. The amount and nature of the public information that is currently available to the plaintiffs largely undermines their claim of prejudice in not being able to conduct discovery prior to being required to show causation.

Also, the Court must assume that plaintiffs are already in possession of evidence to support their allegations of personal injuries and property damage. Fed. R.

Civ. P. 11(b)(3) provides that the signature of the plaintiffs' attorney on the plaintiffs' complaint operates as a certification that the allegations in the complaint have factual support, unless there is a statement that the allegations are likely to have evidentiary support after a reasonable opportunity to conduct discovery. There is no such disclaimer in the plaintiffs' active complaint.

Plaintiffs assert prejudice in having to establish causation, but the defendants contend that the task of establishing causation is due to the plaintiffs' action in suing the entire uranium mining industry in Texas.[2] Defendants contend that, for the most part, they were not in business together and they were not involved together at any single site. They also contend that their activities took place at sites physically separated from each other, in at least three counties during different parts of the last 40 years. The unfairness as to one defendant, Brown & Root, is highlighted by the absence of allegations that would indicate its involvement in any aspect of the uranium mining activities at issue. This underscores the unfairness to the defendants in having to defend this case without the benefit of a prima facie showing of causation.

Notably absent from plaintiffs' brief is a proposed scheduling order that would not violate case law or would not seek to have this 800-plus plaintiff case be treated as any other case. The cases previously discussed obviate the need to handle large, mass-tort cases differently. The plaintiffs failure to suggest a viable option is suspect. Therefore, the Court finds that the prejudice asserted by plaintiffs is largely undermined by the amount of information that is available from public sources and the plaintiffs themselves, and the balance of the respective burdens placed on the parties favors the use of the defendants' proposed scheduling order.

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[2] Defendants contend that, with the exception of defendant Brown & Root, the defendants in this case had some involvement, directly or indirectly, with uranium mining, uranium milling, uranium tailings disposal, or operations related to those activities.

SCHEDULING ORDER MODIFICATION

For the reasons described above, the Court's Order Concerning Consent Trials, Discovery, Pretrial Matters and Pretrial Order, signed July 10, 1996, (docket no. 15) is modified as follows.

1. On or before July 11, 1997, plaintiffs shall produce to defendants, for each individual plaintiff, an affidavit from a qualified expert that will:

A. With respect to each plaintiff's claim for personal injuries:

(1) List all injuries, illnesses or conditions suffered by the plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation;

(2) Specify the material(s) or substance(s), that, in the opinion of the expert, caused each injury, illness or condition listed and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e.,

ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and

(4) State the scientific and medical bases for the expert's opinions.

B. With respect to each plaintiff's claim for property loss:

(1) List all property that, in the opinion of the expert, was damaged by an alleged exposure to material(s) or substance(s) from a facility or operation;

(2) Regarding property alleged to be damaged, identify all real property by owner, street address, tax block and lot number, size and a description of improvements thereto;

(3) Identify the material(s) or substance(s) that, in the opinion of the expert, caused each alleged property damage and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(4) For all property, report the amount of the alleged loss in value, the timing and degree of the alleged loss, the method of causation and the method of evaluation of such alleged loss in value.

2. *Status Conference.* On August 8, 1997, at 9:00 a.m., in United States Magistrate Courtroom B, 727 E. Durango Blvd, San Antonio, Texas, there shall be a status conference at which all pending issues or motions shall be addressed and the following requirements and schedule may be reconsidered.

3. *Initial Discovery Phase.* After the status conference, the following schedule shall apply:

> A. Defendants may depose plaintiffs' expert witnesses and a representative sampling of plaintiffs as chosen or selected by defendants. The deadline for conducting such depositions is November 7, 1997.
>
> B. Defendants shall provide plaintiffs with expert reports in response to (1) deposition testimony of plaintiffs and plaintiffs' experts, and (2) plaintiffs' expert reports and affidavits provided to defendants in accordance with the provisions of paragraph 1, which required plaintiffs to provide defendants with expert reports. Defendants shall provide these expert reports by December 8, 1997.
>
> C. Plaintiffs may depose defendants' expert witnesses and no more than two representatives of each defendant as chosen or selected by plaintiffs. The deadline for conducting such depositions is January 9, 1998.

4. *Mediation.* The parties shall engage in a mediation on a date and before a mediator to be selected by the parties from the approved mediator list of the San Antonio Division of the Western District of Texas. If the parties are unable to agree on a mediator by October 9, 1997, the Court will appoint one after notice by the parties that they are unable to agree on a mediator. On or before October 9, 1997, the parties shall file an advisory as to the name of the mediator selected, or state that they have not reached an agreement. In any event, the mediation shall take place on or before February 9, 1998. Within 7 days after the mediation, the parties shall file a joint

advisory to inform the Court of the date and outcome of the mediation.

5. *Completion of Pretrial Matters and Discovery.* In the event mediation is unsuccessful, the parties may begin all other discovery steps as allowed by the Federal Rules of Civil Procedure and the Local Rules of the Western District of Texas, as the parties deem appropriate. The parties shall, however, comply with the following requirements and schedule:

> A. Within 30 days of mediation, the parties shall file all motions to amend of supplement pleadings or to join additional parties.
>
> B. Within 90 days of mediation, plaintiffs shall designate potential fact witnesses and provide written summaries of their expected testimony.
>
> C. Within 120 days of mediation, plaintiffs shall designate any additional expert witnesses (if any are expected to be used in addition to those identified in accordance with the provision of paragraph 1) and provide written expert reports from each.
>
> D. Within 150 days of mediation, defendants shall designate potential fact witnesses and provide written summaries of their expected testimony.
>
> E. Within 180 days of mediation, defendants shall designate any additional expert witness (if any are expected to be used in addition to those identified under paragraph 3) and provide written expert reports from each.
>
> F. Within 240 days of mediation, the parties shall complete all discovery.

G. Within 270 days of mediation, all dispositive motions shall be filed.

H. Within 300 days of mediation, the parties shall file a joint pretrial order in the form required by the Court.

6. *Trial.* The case will be set by the Court for jury trial to begin on a date 30 days or later after the joint pretrial order is due to be filed.

7. *Other Pretrial Matters.* The Court's Order Concerning Consent Trials, Discovery, Pretrial Matters and Pretrial Order, signed July 10, 1996, shall remain in force to the extent it remains unchanged by the provisions of this Order.

It is so ORDERED.

SIGNED this 11th day of April, 1997.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States
Magistrate Judge

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared C.F. Smith, who, being by me first duly sworn, did depose and state as follows:

1. "My name is C.F. Smith, M.D., and I am a degreed medical doctor licensed to practice medicine in the State of Tennessee. I am fully competent to make this affidavit. All facts contained in this affidavit are within my personal knowledge and are true and correct.

2. "This affidavit was prepared following review of diagnostic radiography, laboratory studies and intake occupational, social and medical histories of the minor's parents and other individuals who worked and resided in the area.

3. "Based upon the aforementioned, and to a reasonable degree of medical certainty, it is my professional opinion, that Elvira Gonzales sustained injuries from exposure to hazardous chemicals and/or radioactive materials resulting from mining and processing of uranium, and substances related to mining activities directly and/or by in-utero exposure of the mother and father.

4. "To reasonable medical probability and scientific certainty, such exposure was to clinically significant doses of hazardous toxic substances sufficient to cause such varied

conditions as kidney disease, arthritis, porphyria, pneumoconiosis and other types of pulmonary problems.

5. "More specifically, it is my professional medical opinion based upon a reasonable degree of medical certainty, that this individual currently suffers from or based upon reasonable medical certainty will in the future suffer from some or all of the following injuries and impairments to health, which were caused by exposure to chemicals, compounds and by-products of uranium mining and milling operations in Karnes County, Texas and surrounding areas, detailed herein.

   Pulmonary pathology
   Kidney pathology
   Dysfunctional cellular immune response
   Dysfunctional humoral immune response
   Hepatic enzymes
   Integumentary pathology
   Musculoskeletal pathology

   Pneumoconiosis
   Pre-pneumoconiosis
   Abnormalities suspective for malignancy
   Abnormal porphyin levels
   Abnormal creatinine clearance

6. "To a reasonable degree of medical certainty, the injuries detailed above are caused from exposure to toxins, which were distributed in and around the area via air, groundwater, as well as other means and methods of transfer and transported

the uranium milling processes of hazardous substances and their by-products across the geographical location of the individuals' presence or residence.

7. "This exposure was on a continual basis to the foregoing, which were by-products of and/or utilized in uranium mining/milling efforts in Karnes County, Texas and surrounding areas, and resulted from, among other avenues, inhalation, ingestion of contaminated water and dust and skin contact.

8. "The particular facilities and operations where these toxins were produced or utilized include:

Panna Maria Project and associated activities;
Conquista Project and associated activities;
Hobson Project and associated activities;
Rhode Ranch Project and associated activities;
Palangana Project and associated activities;
Susquehana Project and associated activities;
Ray Point Project and associated activities;
George West Project and associated activities;
Lamprecht Project and associated activities;
Zamzow Project and associated activities; and/or
Pawnee Project and associated activities.

These facilities/operations were either owned, operated or controlled or engaged in hazardous operations by:

Chevron Corporation;
Chevron U.S.A., Inc., Individually, as parent, and successor in interest to Conoco, Inc.;
Continental Oil Company;
Exxon Corporation;
Rio Grande Resources Corporation;
General Atomics, d/b/a General Atomics Corporation;
Atlantic Richfield Company, as successor in interest to Anaconda Company; and/or
Intercontinental Energy Corporation, d/b/a IEC Corporation.

9. "This exposure to and/or contact with materials and substances including Uranium and its by-products, was generated as a result of mining and milling activities and other chemicals and substances associated in these processes and transport including:

Uranium and its by-products, including but not limited to:
  Radon
  The radioactive isotope daughters of Radon

Strong acids including but not limited to:
  Sulfuric
  Phosphoric
  Hydrochloric

Strong bases, including but not limited to Ammonia

Heavy metals, including but not
limited to Copper Sulfate

Solvents including but not limited to:
Benzene
Carbon tetrachloride
2-Ethylhexanol
Kerosene

10. "The routes of exposure occurred on a daily basis via inhalation, ingestion through water and food, and direct skin contact including toxic substances embedded in clothing. Chronic low doses and, at times, acute high doses at toxic levels were experienced.

11. "The foregoing opinions specifically and directly rely upon and are supported by the following scientific literature:

Tarasenko, N. Ju. (1992). *Uranium, alloys and compounds*. In, Luigi Parmeggiani, (Ed.), Encyclopedia of Occupational Health and Safety, 3rd edition. Geneva: International Labour Office. Pp. 2237-2239.

Sheppard, D. (1992). *Occupational pulmonary disorders*. In, J.B. Wyngaarden, L.H. Smith, and J.D. Bennett (Eds.), Cecil Textbook of Medicine, Philadelphia; W.B. Saunders, Pp. 2333-2340.

Levine, R., Williams, J., Stadtman, E., and Shacter, E. (1994). *Carbonyl assays for determination of oxidatively modified proteins*. Methods in Enzymology. 233:346-357.

Debets. F., Reinders, J-H., Koss, G., Seidel, J., and Strik, A. (1981). Chem.-Biol. Interact. 37:77-94.

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Upton, A.C. Marshall, C.H., and Wald, N. (1994). *Ionizing Radiation.* In. L. Rosenstock and M.R. Cullen (Eds.), Textbook of Clinical Occupational and Environmental Medicine. Pp. 633-645. Philadelphia: W.B. Saunders Co.

Corcoran. G.B., et al. (1994). Contemporary issues in toxicology: apoptosis: molecular control point in toxicity. Toxicology and Applied Pharmacology. 128:169-181.

Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In. Critical Reviews in Toxicology. 23:21-48.

Drummond, G.S. and Kappas, A. (1980). Metal ion interaction in the control of haem oxygenase induction in liver and kidney. Biochem. J. 192:637-648.

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Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In. Critical Reviews in Toxicology. 23:21-48.

Drummond, G.S. and Kappas, A. (1980). Metal ion interaction in the control of haem oxygenase induction in liver and kidney. Biochem. J. 192:637-648.

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Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In. Critical Reviews in Toxicology. 23:21-48.

Levine, R., Williams. J., Stadtman, E., and Shacter, E. (1994). *Carbonyl assays for determination of oxidatively modified proteins.* Methods in Enzymology. 233:346-357.

Salvaggio, J.E. (1990). *The impact of allergy and immunology on our expanding industrial environment.* J. Allergy Clin. Immunol. Vol. 85 P. 689.

Steele, R. W., Williams, A.W., and Beck, S.A. (1989). *Immunotoxicology.* Annals of Allergy. 63:168.

Emmett, E.A. (1992). *Occupational diseases of the skin.* In. J.B. Wyngaarden, L.H. Smith,

and J.C. Bennett (Eds.), Cecil Textbook of Medicine. Pp. 2349-2351. Philadelphia: W.B. Saunders.

Health Physics Society. (1983). Epidemiology Applied to Health Physics. CONF-830101. Pp. 398-406. Springfield, VA: National Technical Information Service.

American Instate of Mining, Metallurgical, and Petroleum Engineers, Inc. (1979). W.J. Schlitt and D.A. Shock, (Eds.). In Situ Uranium Mining and Ground Water Restoration. Ann Arbor, MI:UMI.

New York Academy of Sciences. (1987), E.K. Silbergeld and B.A. Fowler, (eds.), Mechanisms of Chemical-Induced Porphyrinopathies. Volume 514, December 31, 1987, New York: New York Academy of Sciences.

Merritt, R.C. (1971). The Extractive Metallurgy of uranium, Golden, CO: Colorado School of Mines Research Institute.

12. "These opinions have been verified by the scientific method and also considered the potential rate of error for laboratory analysis and radiographic examination.
13. "Additionally, the supporting literature has been cited from peer-reviewed medical and scientific journals.
14. "The foregoing opinions are consistent with the generally accepted methods and procedures for gathering the medical data utilized and are the generally accepted methods used in the practice of medicine and medical research."

FURTHER THE AFFIANT SAYETH NOT.

/s/ C.F. Smith
C.F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 2 day of July, 1997, to certify which witness my hand and official seal of office.

/s/ Ellen Loomstein
Notary Public in and for the
State of Texas

[SEAL] ELLLEN LOOMSTEIN
Notary Public, State of Texas
My Commission Expires
NOV. 8, 1997

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared C.F. Smith, who, being by me first duly sworn, did depose and state as follows:

1. "My name is C.F. Smith, and I am a degreed medical doctor licensed to practice medicine in the State of Tennessee. I am fully competent to make this affidavit. All facts contained in this affidavit are within my personal knowledge and are true and correct.

2. "This affidavit was prepared following review of laboratory studies and intake occupational, social and medical histories.

3. "Based upon the aforementioned, and to a reasonable degree of medical certainty, it is my professional opinion that **Rolando Barrientez, SS# 462-51-2526, DOB: 2/19/79** , sustained injuries from exposure to hazardous chemicals and/or radioactive materials resulting from mining and processing of uranium.

   Laboratory abnormalities include, but are not limited to:

   Abnormal T-helper cell/T-suppressor cell ratio
   Altered natural killer cell activity
   Increased apoptosis
   Rheumatoid factors
   Angiotensin enzyme
   Liver enzymes

4. "To a reasonable degree of medical certainty, these abnormal findings resulted from this individual's exposure to toxins, which were transferred and transported from the workplace and other means and methods of transfer and transport from the uranium mining/milling operation, and were part of the uranium mining and milling processes and their by-products.

5. "Exposure was on a daily basis to the foregoing, which were by-products of and/or utilized in uranium mining/milling efforts in Karnes County, Texas and surrounding areas. Rolando Barrientez's exposure resulted from inhalation, ingestion of contaminated water and dust and skin contact.

6. "The particular facilities and operations that were the sources for exposure include:

Chevron Corporation;
Chevron U.S.A., Inc., Individually, as parent, and successor in interest to Conoco, Inc.;
Continental Oil Company;
Exxon Corporation;
Rio Grande Resources Corporation;
General Atomics, d/b/a General Atomics Corporation;
Atlantic Richfield Company, as successor in interest to Anaconda Company;
Intercontinental Energy Corporation, d/b/a IEC Corporation.

"The particular facilities and operations where these toxins were produced or utilized include:

Panna Maria Project and associated activities;
Conquista Project and associated activities;
Hobson Project and associated activities;
Rhode Ranch Project and associated activities;
Palagana Project and associated activities;
Susquehana Project and associated activities;
Ray Point Project and associated activities;
George West Project and associated activities;
Lamprecht Project and associated activities;
Zamzow Project and associated activities; and/or
Pawnee Project and associated activities.

7. "Exposure to and contact with materials and substances including Uranium and its by-products generated as a result of mining and milling activities and other chemicals associated in these processes included:

Uranium and its by-products, including but not limited to:

Radon
The radioactive isotope daughters of Radon

Strong acids including but not limited to:

Sulfuric
Phosphoric
Hydrochloric

Strong bases, including but not limited to Ammonia
Heavy metals, including but not limited to Copper Sulfate
Solvents including but not limited to:

Benzene
Carbon tetrachloride
2-Ethylhexanol
Kerosene.

8. "The routes of exposure occurred on a daily basis via inhalation, ingestion through water and food, and direct skin contact including toxic substances embedded in clothing. Chronic, repetitive low doses and, at times, acute high doses at toxic levels were experienced by Rolando Barrientez.

9. "To reasonable medical probability and scientific certainty, Rolando Barrientez was subjected to clinically significant doses of hazardous toxic substances sufficient to cause kidney disease, arthritis, porphyria, pneumoconiosis and other types of pulmonary problems.

10. "More specifically, it is my professional medical opinion based upon a reasonable degree of medical certainty and supported by acceptable and

scientifically recognized testing that Rolando Barrientez suffers from the following impairments to health; which were caused by exposure to the aforementioned chemicals, compounds and by-products of uranium mining and milling operations in Karnes County, Texas and surrounding areas:

> Dysfunctional cellular immune response.
> Dysfunctional humoral immune response.
> Immune dysregulation.

11. "The foregoing opinions specifically and directly rely upon and are supported by the following scientific literature:

> Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In, **Critical Reviews in Toxicology.** 23:21-48.
>
> Upton, A. C., Marshall, C. H., and Wald, N. (1994). *Ionizing Radiation.* In, L. Rosenstock and M. R. Cullen (Eds.), **Textbook of Clinical Occupational and Environmental Medicine.** Pp. 633-645. Philadelphia: W. B. Saunders Co.
>
> Corcoran, G.B., et al. (1994). Contemporary issues in toxicology: apoptosis: molecular control point in toxicity. **Toxicology and Applied Pharmacology.** 128:169-181.
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> Salvaggio, J. E. (1990). *The impact of allergy and immunology on our expanding industrial environment.* **J. Allergy Clin. Immunol.** Vol. 85 p. 689.

Steele, R. W., Williams, A. W., and Beck, S. A. (1989). *Immunotoxicology.* **Annals of Allergy.** 63:168.

Emmett, E. A. (1992). *Occupational diseases of the skin.* In, J. B. Wyngaarden, L. H. Smith, and J. C. Bennett (Eds.), **Cecil Textbook of Medicine.** Pp. 2349-2351. Philadelphia: W. B. Saunders.

Health Physics Society. (1983). **Epidemiology Applied to Health Physics.** CONF-830101. Pp. 398-406. Springfield, VA: National Technical Information Service.

American Institute of Mining, Metallurgical, and Petroleum Engineers, Inc. (1979). W. J. Schlitt and D. A. Shock, (Eds.), **In Situ Uranium Mining and Ground Water Restoration.** Ann Arbor, MI: UMI.

New York Academy of Sciences. (1987). E. K. Silbergeld and B. A. Fowler, (eds.), **Mechanisms of Chemical-Induced Porphyrinopathies.** Volume 514, December 31, 1987. New York: New York Academy of Sciences.

Merritt, R. C. (1971). **The Extractive Metallurgy of Uranium.** Golden, CO: Colorado School of Mines Research Institute.

Hodge, H. C., J. N. Stannard, and J. B. Hursh. (1973). **Uranium Plutonium Transplutonic Elements.** In series: Handbook of Experimental Pharmocology, vol. XXXVI. New York: Springer-Verlag.

12. "This opinion has been verified by the scientific method. Rolando Barrientez underwent a battery of scientific blood analyses. Moreover, this

opinion has considered the potential rate of error for laboratory analysis.

13. "Additionally, the supporting literature has been cited from peer-reviewed medical and scientific journals.

14. "The foregoing opinions are consistent with the generally accepted methods and procedures for gathering the medical data utilized and are the generally accepted methods used in the practice of medicine and medical research."

FURTHER, AFFIANT SAYETH NOT.

/s/ C. F. Smith, M.D.
C. F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 29th day of August, 1997, to certify which witness my hand and official seal of office.

[SEAL]
ELLEN LOOMSTEIN
Notary Public, State of Texas
My Commission Expires
NOV. 8, 1997

/s/ Ellen Loomstein
Notary Public in and
for the State of Texas

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared C.F. Smith, who, being by me first duly sworn, did depose and state as follows:

1. "My name is C.F. Smith, and I am a degreed medical doctor licensed to practice medicine in the State of Tennessee. I am fully competent to make this affidavit. All facts contained in this affidavit are within my personal knowledge and are true and correct.

2. "This affidavit was prepared following review of laboratory studies and intake occupational, social and medical histories.

3. "Based upon the aforementioned, and to a reasonable degree of medical certainty, it is my professional opinion that **Jeanice Lopez, SS# 462-59-6363, DOB: 7/26/78,** sustained injuries from exposure to hazardous chemicals and/or radioactive materials resulting from mining and processing of uranium.

   Laboratory abnormalities include, but are not limited to:

   Altered natural killer cell activity
   Anti-DNA base antibodies IgM, IgG.
   Rheumatoid factors

4. "To a reasonable degree of medical certainty, these abnormal findings resulted from this individual's exposure to toxins, which were transferred and transported from the workplace and

other means and methods of transfer and transport from the uranium mining/milling operation, and were part of the uranium mining and milling processes and their by-products.

5. "Exposure was on a daily basis to the foregoing, which were by-products of and/or utilized in uranium mining/milling efforts in Karnes County, Texas and surrounding areas. Jeanice Lopez's exposure resulted from inhalation, ingestion of contaminated water and dust and skin contact.

6. "The particular facilities and operations that were the sources for exposure include:

   Chevron Corporation;
   Chevron U.S.A., Inc., Individually, as parent, and successor in interest to Conoco, Inc.;
   Continental Oil Company;
   Exxon Corporation;
   Rio Grande Resources Corporation;
   General Atomics, d/b/a General Atomics Corporation;
   Atlantic Richfield Company, as successor in interest to Anaconda Company;
   Intercontinental Energy Corporation, d/b/a IEC Corporation.

   "The particular facilities and operations were these toxins were produced or utilized include:

   Panna Maria Project and associated activities;
   Conquista Project and associated activities;
   Hobson Project and associated activities;
   Rhode Ranch Project and associated activities;
   Palagana Project and associated activities;

Susquehana Project and associated activities;
Ray Point Project and associated activities;
George West Project and associated activities;
Lamprecht Project and associated activities;
Zamzow Project and associated activities; and/or
Pawnee Project and associated activities.

7. "Exposure to and contact with materials and substances including Uranium and its by-products generated as a result of mining and milling activities and other chemicals associated in these processes included:

Uranium and its by-products, including but not limited to:

Radon
The radioactive isotope daughters of Radon

Strong acids including but not limited to:

Sulfuric
Phosphoric
Hydrochloric

Strong bases, including but not limited to Ammonia
Heavy metals, including but not limited to Copper Sulfate
Solvents including but not limited to:

Benzene
Carbon tetrachloride
2-Ethylhexanol
Kerosene.

8. "The routes of exposure occurred on a daily basis via inhalation, ingestion through water

and food, and direct skin contact including toxic substances embedded in clothing. Chronic, repetitive low doses and, at times, acute high doses at toxic levels were experienced by Jeanice Lopez.

9. "To reasonable medical probability and scientific certainty, Jeanice Lopez was subjected to clinically significant doses of hazardous toxic substances sufficient to cause kidney disease, arthritis, porphyria, pneumoconiosis and other types of pulmonary problems.

10. "More specifically, it is my professional medical opinion based upon a reasonable degree of medical certainty and supported by acceptable and scientifically recognized testing that Jeanice Lopez suffers from the following impairments to health; which were caused by exposure to the aforementioned chemicals, compounds and by-products of uranium mining an milling operations in Karnes County, Texas and surrounding areas:

    Dysfunctional cellular immune response.
    Dysfunctional humoral immune response.
    Immune dysregulation.

11. "The foregoing opinions specifically and directly rely upon and are supported by the following scientific literature:

    Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In, **Critical Reviews in Toxicology.** 23:21-48.

    Salvaggio, J. E. (1990). *The impact of allergy and immunology on our expanding industrial*

environment. **J. Allergy Clin. Immunol.** Vol. 85 p. 689.

Steele, R. W., Williams, A. W., and Beck, S. A. (1989). *Immunotoxicology.* **Annals of Allergy.** 63:168.

Emmett, E. A. (1992). *Occupational diseases of the skin.* In, J. B. Wyngaarden, L. H. Smith, and J. C. Bennett (Eds.), **Cecil Textbook of Medicine.** Pp. 2349-2351. Philadelphia: W. B. Saunders.

Health Physics Society. (1983). **Epidemiology Applied to Health Physics.** CONF-830101. Pp. 398-406. Springfield, VA: National Technical Information Service.

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Merritt, R. C. (1971). **The Extractive Metallurgy of Uranium.** Golden, CO: Colorado School of Mines Research Institute.

Hodge, H. C., J. N. Stannard, and J. B. Hursh. (1973). **Uranium Plutonium Transplutonic Elements.** In series: Handbook of Experimental Pharmocology, vol. XXXVI. New York: Springer-Verlag.

12. "This opinion has been verified by the scientific method. Jeanice Lopez underwent a battery of scientific blood analyses. Moreover, this opinion has considered the potential rate of error for laboratory analysis.

13. "Additinally, the supporting literature has been cited from peer-reviewed medical and scientific journals.

14. "The foregoing opinions are consistent with the generally accepted methods and procedures for gathering the medical data utilized and are the generally accepted methods used in the practice of medicine and medical research."

FURTHER, AFFIANT SAYETH NOT.

/s/ C. F. Smith, M.D.
C. F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 29th day of August, 1997, to certify which witness my hand and official seal of office.

[SEAL]
ELLEN LOOMSTEIN
Notary Public, State of Texas
My Commission Expires
NOV. 8, 1997

/s/ Ellen Loomstein
Notary Public in and
for the State of Texas

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared C.F. Smith, who, being by me first duly sworn, did depose and state as follows:

1. "My name is C.F. Smith, M.D. and I am a degreed medical doctor licensed to practice medicine in the State of Tennessee. I am fully competent to make this affidavit. All facts contained in this affidavit are within my personal knowledge and are true and correct.

2. "This affidavit was prepared following review of laboratory studies and intake social and medical histories.

3. "Based upon the aforementioned, and to a reasonable degree of medical certainty, it is my professional opinion that **Richard DeLeon, SS# 459-69-7870, DOB: 2/2/84**, sustained injuries from exposure to hazardous chemicals and/or radioactive materials resulting from mining and processing of uranium. Laboratory abnormalities include, but are not limited to:

   Abnormal T-helper cell/T-suppressor cell ratio.
   Altered natural killer cell activity.
   Angiotensin enzyme.
   Liver enzymes.
   Immune dysregulation.

4. "To a reasonable degree of medical certainty, these abnormal findings resulted from this individual's exposure to toxins, which were transferred and transported from the workplace and

other means and methods of transfer and transport from the uranium mining/milling operation, and were part of the uranium mining and milling processes and their by-products.

5. "Exposure was on a daily basis to the foregoing, which were by-products of and/or utilized in uranium mining/milling efforts in Karnes County, Texas and surrounding areas. Richard DeLeon's exposure resulted from inhalation, ingestion of contaminated water and dust and skin contact.

6. "The particular facilities and operations that were the sources for exposure include:
Chevron Corporation;
Chevron U.S.A., Inc., Individually, as parent, and successor in interest to Conoco, Inc.;
Continental Oil Company;
Exxon Corporation;
Rio Grande Resources Corporation;
General Atomics, d/b/a General Atomics Corporation;
Atlantic Richfield Company, as successor in interest to Anaconda Company;
Intercontinental Energy Corporation, d/b/a IEC Corporation.

"The particular facilities and operations where these toxins were produced or utilized include:
Panna Maria Project and associated activities;
Conquista Project and associated activities;
Hobson Project and associated activities;
Rhode Ranch Project and associated activities;
Palangana Project and associated activities;
Susquehana Project and associated activities;
Ray Point Project and associated activities;
George West Project and associated activities;

Lamprecht Project and associated activities;
Zamzow Project and associated activities; and/or
Pawnee Project and associated activities.

7. "Exposure to and contact with materials and substances including Uranium and its by-products generated as a result of mining and milling activities and other chemicals associated in these processes included:

   Uranium and its by-products, including but not limited to:
      Radon
      The radioactive isotope daughters of Radon

   Strong acids including but not limited to:
      Sulfuric
      Phosphoric
      Hydrochloric

   Strong bases, including but not limited to Ammonia

   Heavy metals, including but not limited to Copper Sulfate

   Solvents including but not limited to:
      Benzene
      Carbon tetrachloride
      2-Ethylhexanol
      Kerosene.

8. "The routes of exposure occurred on a daily basis via inhalation, ingestion through water and food, and direct skin contact including toxic substances embedded in clothing. Chronic, repetitive low doses and, at times, acute high doses at toxic levels were experienced by Richard DeLeon.

9. "To reasonable medical probability and scientific certainty, Richard DeLeon was subjected to clinically significant doses of hazardous toxic substances sufficient to cause kidney disease, arthritis, porphyria, pneumoconiosis and other types of pulmonary problems.

10. "More specifically, it is my professional medical opinion based upon a reasonable degree of medical certainty and supported by acceptable and scientifically recognized testing that Richard DeLeon suffers from the following impairments to health; which were caused by exposure to the aforementioned chemicals, compounds and byproducts of uranium mining and milling operations in Karnes County, Texas and surrounding areas:

    Dysfunctional cellular immune response.
    Dysfunctional humoral immune response.
    Hepatic dysfunction.
    Immune dysregulation.

11. "The foregoing opinions specifically and directly rely upon and are supported by the following scientific literature:

    Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In, Critical Reviews in Toxicology. 23:21-48.

    Upton, A.C., Marshall, C.H., and Wald, N. (1994). *Ionizing Radiation*. In, L. Rosenstock and M.R. Cullen (Eds.), Textbook of Clinical Occupational and Environmental Medicine, Pp. 633-645. Philadelphia: W.B. Saunders Co.

Salvaggio, J.E. (1990). *The impact of allergy and immunology on our expanding industrial environment*. J. Allergy Clin. Immunol. Vol. 85 p. 689.

Steele, R.W., Williams, A.W., and Beck, S.A. (1989). *Immunotoxicology*. Annals of Allergy. 63:168.

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Merritt, R.C. (1971). The Extractive Metallurgy of Uranium. Golden, CO: Colorado School of Mines Research Institute.

Hodge, H.C., J.N. Stannard, and J.B. Hursh. (1973). Uranium Plutonium Transplutonic Elements. In series: Handbook of Experimental Pharmacology, vol. XXXVI. New York: Springer-Verlag.

12. "This opinion has been verified by the scientific method. Richard DeLeon underwent a battery of scientific blood analyses. Moreover, this opinion has considered the potential rate of error for laboratory analysis.

13. "Additionally, the supporting literature has been cited from peer-reviewed medical and scientific journals.

14. "The foregoing opinions are consistent with the generally accepted methods and procedures for

gathering the medical data utilized and are the generally accepted methods used in the practice of medicine and medical research."

FURTHER, AFFIANT SAYETH NOT.

/s/ C.F. Smith
C.F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 29th day of August, 1997, to certify which witness my hand and official seal of office.

(SEAL)
ELLEN LOOMSTEIN
Notary Public,
State of Texas
My Commission Expires
NOV. 8, 1997

/s/ Ellen Loomstein
Notary Public in and
for the State of Texas

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared C.F. Smith, who, being by me first duly sworn, did depose and state as follows:

1. "My name is C.F. Smith, and I am a degreed medical doctor licensed to practice medicine in the State of Tennessee. I am fully competent to make this affidavit. All facts contained in this affidavit are within my personal knowledge and are true and correct.

2. "This affidavit was prepared following review of laboratory studies and intake occupational, social and medical histories.

3. "Based upon the aforementioned, and to a reasonable degree of medical certainty, it is my professional opinion that **Wallace Pullin, SS# 525-37-6638, DOB: 11/17/68**, sustained injuries from exposure to hazardous chemicals and/or radioactive materials resulting from mining and processing of uranium.

   Laboratory abnormalities include, but are not limited to:

   Abnormal T-helper cell/T-suppressor cell ratio
   Altered natural killer cell activity
   Anti-DNA base antibodies IgM, IgG.
   Increased apoptosis
   Rheumatoid factors
   Angiotensin enzyme
   Liver enzymes

4. "To a reasonable degree of medical certainty, these abnormal findings resulted from this individual's exposure to toxins, which were transferred and transported from the workplace and other means and methods of transfer and transport from the uranium mining/milling operation, and were part of the uranium mining and milling processes and their by-products.

5. "Exposure was on a daily basis to the foregoing, which were by-products of and/or utilized in uranium mining/milling efforts in Karnes County, Texas and surrounding areas. Wallace Pullin's exposure resulted from inhalation, ingestion of contaminated water and dust and skin contact.

6. "The particular facilities and operations where these toxins were produced or utilized include:

Chevron Corporation;
Chevron U.S.A., Inc., Individually, as parent, and successor in interest to Conoco, Inc.;
Continental Oil Company;
Exxon Corporation;
Rio Grande Resources Corporation;
General Atomics, d/b/a General Atomics Corporation;
Atlantic Richfield Company, as successor in interest to Anaconda Company;
Intercontinental Energy Corporation, d/b/a IEC Corporation.

"The particular facilities and operations where these toxins were produced or utilized include:

Panna Maria Project and associated activities;
Conquista Project and associated activities;
Hobson Project and associated activities;
Rhode Ranch Project and associated activities;
Palangana Project and associated activities;
Susquehana Project and associated activities;
Ray Point Project and associated activities;
George West Project and associated activities;
Lamprecht Project and associated activities;
Zamzow Project and associated activities; and/or
Pawnee Project and associated activities.

7. "Exposure to and contact with materials and substances including Uranium and its by-products generated as a result of mining and milling activities and other chemicals associated in these processes included:

Uranium and its by-products, including but not limited to:

Radon
The radioactive isotope daughters of Radon
Strong acids including but not limited to:
Sulfuric
Phosphoric
Hydrochloric
Strong bases, including but not limited to Ammonia
Heavy metals, including but not limited to Copper Sulfate
Solvents including but not limited to:
Benzene
Carbon tetrachloride
2-Ethylhexanol
Kerosene.

8. "The routes of exposure occurred on a daily basis via inhalation, ingestion through water and food, and direct skin contact including toxic substances embedded in clothing. Chronic, repetitive low doses and, at times, acute high doses at toxic levels were experienced by Wallace Pullin.

9. "To reasonable medical probability and scientific certainty, Wallace Pullin was subjected to clinically significant doses of hazardous toxic substances sufficient to cause kidney disease, arthritis, porphyria, pneumoconiosis and other types of pulmonary problems.

10. "More specifically, it is my professional medical opinion based upon a reasonable degree of medical certainty and supported by acceptable and scientifically recognized testing that Wallace Pullin suffers from the following impairments to

health; which were caused by exposure to the aforementioned chemicals, compounds and by-products of uranium mining and milling operations in Karnes County, Texas and surrounding areas:

> Dysfunctional cellular immune response.
> Dysfunctional humoral immune response.
> Hepatic dysfunction.

11. "The foregoing opinions specifically and directly rely upon and are supported by the following scientific literature:

Kehrer, J. (1993). *Free radicals as mediators of tissue injury and disease.* In, **Critical Reviews in Toxicology**. 23:21-48.

Levine, R., Williams, J., Stadtman, E., and Shacter, E. (1994). *Carbonyl assays for determination of oxidatively modified proteins.* **Methods in Enzymology**. 233:346-357.

Upton, A.C., Marshall, C.H., and Wald, N. (1994). *Ionizing Radiation.* In, L. Rosenstock and M.R. Cullen (Eds.), **Textbook of Clinical Occupational and Environmental Medicine.** Pp. 633-645. Philadelphia: W.B. Saunders Co.

Corcoran, G.B., et al. (1994). Contemporary issues in toxicology: apoptosis: molecular control point in toxicity. **Toxicology and Applied Pharmacology**. 128:169-181.

Salvaggio, J.E. (1990). *The impact of allergy and immunology on our expanding industrial environment.* **J. Allergy Clin. Immunol.** Vol. 85 p. 689.

Steele, R.W., Williams, A.W., and Beck, S.A. (1989). *Immunotoxicology*. **Annals of Allergy**. 63:168.

Emmett, E.A. (1992). *Occupational diseases of the skin*. In, J.B. Wyngaarden, L.H. Smith, and J.C. Bennett (Eds.), **Cecil Textbook of Medicine**. Pp. 2349-2351. Philadelphia: W.B. Saunders.

Health Physics Society. (1983). **Epidemiology Applied to Health Physics.** CONF-830101. Pp. 398-406. Springfield, VA: National Technical Information Service.

American Institute of Mining, Metallurgical, and Petroleum Engineers, Inc. (1979). W.J. Schlitt and D.A. Shock, (Eds.), **In Situ Uranium Mining and Ground Water Restoration.** Ann Arbor, MI: UMI.

New York Academy of Sciences. (1987). E.K. Silbergeld and B.A. Fowler, (eds.), **Mechanisms of Chemical-Induced Porphyrinopathies.** Volume 514, December 31, 1987. New York: New York Academy of Sciences.

Merritt, R.C. (1971). **The Extractive Metallurgy of Uranium.** Golden, CO: Colorado School of Mines Research Institute.

Hodge, H.C., J.N. Stannard, and J.B. Hursh. (1973). **Uranium Plutonium Transplutonic Elements.** In series: Handbook of Experimental Pharmacology, vol. XXXVI. New York: Springer-Verlag.

12. "This opinion has been verified by the scientific method. Wallace Pullin underwent a battery of scientific blood analyses. Moreover, this opinion has considered the potential rate of error for laboratory analysis.

13. "Additionally, the supporting literature has been cited from peer-reviewed medical and scientific journals.

14. "The foregoing opinions are consistent with the generally accepted methods and procedures for gathering the medical data utilized and are the generally accepted methods used in the practice of medicine and medical research."

FURTHER, AFFIANT SAYETH NOT.

/s/ C.F. Smith
C.F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 29th day of August, 1997, to certify which witness my hand and official seal of office.

(SEAL)
ELLEN LOOMSTEIN
Notary Public,
State of Texas
My Commission Expires
NOV. 8, 1997

/s/ Ellen Loomstein
Notary Public in and
for the State of Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA, et al., *
*
Plaintiffs, *
v. *
*
BROWN & ROOT, et al., *
*
Defendants. *

CIVIL NO.
SA-96-CA-543
(Filed Sep 16, 1997)

ORDER

Before the Court is *Defendants' Motion To Dismiss Or, Alternatively, To Enforce Scheduling Order.* Docket no. 59. Defendants seek dismissal or compliance with the scheduling order entered by the Court. Plaintiffs contend that they have complied with the scheduling order. Upon consideration of the motion, response and supporting affidavits, the Court will grant the motion to enforce the scheduling order.

Discussion

The Court entered a scheduling order (docket no. 54) that required plaintiffs to establish a prima facie case of causation of the alleged injuries before discovery would be permitted. The unique and complex nature of a toxic tort case such as this, with over 1000 plaintiffs, serves as the reason for such a requirement. The scheduling order requires plaintiffs to provide affidavits to establish causation for each plaintiff's personal injuries and property damages.

In regard to each plaintiff's claim for personal injuries, plaintiffs were required to produce affidavits from qualified experts that:

> 1) List all injuries, illnesses or conditions suffered by the plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation;
>
> 2) Specify the material(s) or substance(s), that, in the opinion of the expert, caused each injury, illness or condition listed and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);
>
> 3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e., ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and
>
> 4) State the scientific and medical bases for the expert's opinions.

In an attempt to comply with the scheduling order, plaintiffs have tendered to defendants 1058 affidavits from the same doctor. The affidavits fall into one of four basic forms where only the name of the plaintiff was changed, except for some limited differences between the affidavits in the second and third forms. The first form is used for 16 deceased plaintiffs. The second form is used for 154 plaintiffs that were subject to exposure to toxins during the course of their employment. The third form is used for 218 plaintiffs that have been subject to toxins in the environment. The fourth form is used for 670 plaintiffs that claim exposure to toxins as minors.

Upon review of the affidavits, the Court finds that they do not satisfy the requirements of the scheduling order because they are conclusory and speculative. Plaintiffs shall be given another opportunity to comply with the Court's scheduling order. In order to provide plaintiffs guidance, the Court makes the following findings regarding plaintiff's affidavits.

Although plaintiffs identified 235 medical experts and 97 potential liability experts, the affidavits submitted by plaintiffs were authored by one medical doctor, C. F. Smith, M.D. Dr. Smith attempts to identify the materials used or allegedly released from uranium mining and milling operations. Dr. Smith also attempted to describe the alleged pathways of the plaintiffs' purported exposures. Although it is permissible to have one expert to provide testimony for each of the four requirements, it is not necessary that plaintiffs be so limited. Also, the Court notes that an expert can only provide an expert opinion regarding subjects within his area of expertise. The scheduling order requires that, as to each plaintiff, each of the four requirements must be established by an affidavit from an expert. It does not require that only one affidavit can be submitted to satisfy all four requirements. This may have caused plaintiffs some confusion, and may have resulted in the submission of the deficient affidavits.

For each form of affidavit, Dr. Smith states that the plaintiff's exposure to toxic substances was sufficient to cause a variety of conditions, and caused *some or all* of a list of injuries. ***Motion***, Exh. 6, paragraphs 4 & 5. Such affidavits do not comply with the requirement to "list injuries, illnesses or conditions suffered." Plaintiffs must provide the specific injuries, illnesses or conditions suffered by each plaintiff.[1] Together with that information, plaintiffs must also provide the scientific and medical bases for each opinion. To state that a battery of tests were performed is insufficient. Plaintiffs must name the tests and indicate the results of the tests.

In regard to the purported pathways of exposure to toxins, plaintiffs attempt to describe exposure in general terms, examples of which are found on page 4 of defendants' motion. Noticeably lacking is a specific description of the source of such toxins encountered by each plaintiff and the specific dates and circumstances of such exposure. Plaintiffs attempt identify the sources of toxins by simply listing every facility operated by each of the defendants. Such an exhaustive listing for each plaintiff appears meaningless in light of (1) the absence of employment information provided for those persons that allegedly were exposed to toxins during the course of their employment, and (2) the absence of the residence information for those persons that allegedly were exposed to toxins in their surrounding environment. Plaintiffs should specify the time period of exposure, and they should provide relevant employment information[2] or residence information, depending on how each was exposed to toxins.

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[1] Dr. Smith's affidavits state that numerous plaintiffs have an impaired condition described as "dysfunctional cellular immune response." Defendants contend that it is not a known disease or disorder. The affidavits list several scholarly writings as the basis for the conclusions of Dr. Smith. Therefore, plaintiffs should also provide documentation to sufficiently describe "dysfunctional cellular immune response."

Defendants also question the stated cause for the injuries of the minors as being "in-utero exposure of the mother *and father.*" Plaintiffs should also describe that form of exposure.

Plaintiffs similarly fail to describe with particularity the dosage of exposure as to each plaintiff. The closest statement of dosage is that "[c]hronic low doses and, at time, acute high doses at toxic levels were experienced." ***Motion***, Exh. 6, par. 10, Exh. 7, par. 9, Exh. 8, par. 8, Exh. 9, par. 10. Plaintiffs must state with particularity the dosage of exposure at to each plaintiff. Closely related to this is the specific duration of exposure of each plaintiff, which is noticeably absent from the affidavits.

The affidavits must indicate for each plaintiff the nature of injuries, the specific cause of the injuries and how certain facilities or operations substantially contributed to the cause. The affidavits must enable correlation of any geographic group or groupings of plaintiffs to certain facilities or operations. The Court must be able to tell how each plaintiff was injured and what each defendant did to cause such injury.[3] Plaintiffs must establish a prima facie case of causation of their injuries, and the Court's scheduling order describes how a prima facie case can be established.

---

[2] Relevant employment information should include the employer's identity, dates of employment and reference to where work was performed.

[3] The defendants contend that no particular involvement has been shown as to defendant Brown & Root. If applicable, plaintiffs should describe the involvement of Brown & Root in describing how each of them was injured.

In regard to property damages, no affidavits have been provided to show either the type of damages or the causation of such damages. If plaintiffs provide such affidavits in accordance with this Order, then the affidavits must meet the particularity requirements set forth in the scheduling order, just as they must for personal injury claims.

Conclusion

For these reasons, the motion to enforce the scheduling order is **GRANTED**. On or before October 31, 1997, the plaintiffs shall:

> 1) provide affidavits from qualified experts addressing the subjects required by the scheduling order that are within their area(s) of expertise;
>
> 2) provide affidavits addressing *individualized* information about particular plaintiffs, as required by the scheduling order;
>
> 3) provide affidavits stating a specific medical diagnosis of each individual plaintiff, as required by the scheduling order;
>
> 4) provide affidavits stating alleged exposures individually and with the specificity required by the scheduling order;
>
> 5) provide affidavits stating which of the defendants or operations allegedly caused harm to each particular plaintiff, as required by the scheduling order, and
>
> 6) provide affidavits in regard to property damage, as required by the scheduling order, or the

> failure to provide them will be considered waiver of the property damage claims.

Plaintiffs must provide the affidavits to defendants. If defendants consider the affidavits to be insufficient, then they may file a motion to dismiss for failure to comply with the scheduling order. If such a motion is filed and the undersigned finds that the plaintiffs have not complied with the scheduling order, then the undersigned will recommend dismissal of this case to the District Court.

It is so **ORDERED**.

SIGNED this 16 day of September, 1997.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States
Magistrate Judge

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

Supplemental Affidavit of
Dr. Charlie F. Smith, M.D.

Before me the undersigned authority personally appeared Charlie F. Smith, M.D. who upon his oath did depose and state the following:

1. "My name is Charlie F. Smith, M.D. I am over the age of 18 and fully competent to make this affidavit. All facts contained in this affidavit are true and correct and within my personal knowledge, subject only to information that I am relying on as an expert.

2. "I am able to state my medical diagnosis regarding the individuals that previously provided affidavits on after a complete, exhaustive, medical, scientific and socially relevant review. Specifically, I have reviewed the personally provided documentary information on each individual plaintiff. Encompassed in this review I have screened and evaluated 1) the social history of each plaintiff 2) the geographical location of each plaintiff 3) the employment data of each plaintiff where relevant 4) the symptoms, complaints and my systematic medical observations 5) a review of each individual's relevant scientific testing 6) the reports, findings and conclusions of other medical experts and 7) the available scientific literature which has been peer reviewed and/or widely accepted in the areas relevant to this case.

3. "In my previous affidavits I was able to limit and quantify the universe of medical problems suffered by the plaintiffs. I am now able to state categorically that it is my considered medical opinion based on reasonable medical probability that the individuals named are suffering from the medical conditions listed in my earlier affidavits. There are easily available, easily medically explainable reasons why these individuals as a group suffer from substantially similar medical maladies. First, these individuals are all within a fairly close geographical distance from identical mining and milling activity all of which used essentially the same chemicals and chemical processes and all of which were mining and milling substantially the same type of ore.

4. "The above facts coupled with the fact that virtually all human organisms are damaged at relatively low dosages of these particularly highly toxic substances account for the similarity and uniformity of medical condition particularly due to the fact that we are dealing with a chronic exposure situation taking place over relatively long periods of time. This affidavit is supplemental to my previous affidavits as my opinion based on reasonable medical probability to conditions listed are currently being suffered by each of the plaintiffs which are the subject of my previous affidavits.

Battery of Tests

5. "My reading of the Order of 16 September 1997 tells me to make a description of the battery of tests that were run on each plaintiff. All of the plaintiffs were subjected to the same battery of blood testing that I will refer to as Stage 1. Specifically, these tests are called immunotoxicology, cell cycle kinetics, and enzyme activity analysis.

   "For individuals whose Stage 1 results were findings of apoptosis, angiotenzyme, anti-DNAse based protein, or abnormal killer cell activity among other findings, further testing was provided which is called SMA21, Creatine Clearance and 24-Hour Prophyrin analysis.

6. "Particular individuals as a result of medical history and/or specific blood testing were subjected to the testing known as roentgenography for purposes of determining what specific lung damage could be documented, if any. This testing is performed by subjecting the individual to radiographic tests. The results of that testing was forwarded to Dr. Glen Baker, a board certified pulmonologist, or Dr. James Ratajczak, a board certified radiologist, who then analyze that testing which is known as B-Reading. This testing is widely accepted and is used in silicosis and asbestosis cases. The results of the blood testing are being produced in accordance with the Magistrate Judge's Order.

Immunological Testing

7. "According to a footnote in the September Order, the Magistrate Judge notes that defendants contend that the dysfunctional cellular immune response is not a known disease or disorder. To the contrary, since the late 1980s "dysfunctional cellular immune response" has been documented (see Exhibit A), which comprehensively describe this disorder.

8. "Regarding in utero exposure of the mother and father in connection with the maladies suffered by the minors I mean to have that interpreted in the accepted fashion. My meaning there is obvious that the fathers of these children suffered cellular damage as a result of their employment/residence in the community as well as that of the mothers of these children who were in contact with radioactive and toxic materials from radioactive and chemically saturated dust in the community generally and were applicable from the clothing of their husbands. This would be the description of that form of exposure. Parents employed in mining and mining-related vocations suffered continous exposure to a wide array of toxic substances during the course and scope of their employment. Continual exposure to both radiation and toxic levels of hazardous chemicals resulted in documented cellular damage and damage to their DNA reparative mechanisms. Their reqpective spouses who were not employed in mining and mining-related livelihoods were, nonetheless, linked to the same

radioactive and toxic materials in two ways. First, radioactive, chemically-soaked dust spread out from the workplaces and blanketed the community in general. Secondly, intimate contact with or handling of their spouses' work clothes, vehicles, work gear, etc. provided another opportunity for exposure to the toxic materials associated with uranium mining and milling practices. This would be the description of that exposure. Some of these hazardous chemicals are known as teratogenics, and others are known to cross the placental barrier. The known teratogens are: copper, molybdenum and cadmium. (Lewis, 1992)

9. "In a herculean effort to organize the requested information regarding a specific description of the source of such toxins encountered by each plaintiff in groupings suggested by the U.S. Magistrate Judge and the specific dates and circumstances of such exposure I have made great efforts to categorize 877 plaintiffs in this case. Below are the categories established for each plaintiff as requested.

Plaintiffs Who Had Direct Exposure in the Uranium Mining and Milling Process.

10. "The following list of individuals had direct toxic exposure in the specifically named sites operated by the defendants. These individuals are organized into Group No. 1. The majority of these individuals had direct employment at the mines/milling facilities while others were required by their employment to be present at these

locations. Attached as Exhibit B is a comprehensive listing of these individuals with specific employment information, dates of employment and job titles, in accordance with the U.S. Magistrate Judge's request.

11. "Since each of these above-named individuals worked in the mining/milling operations for no less than six months and to a maximum of 30 years it will not be necessary to list each plaintiff's length of employment in this affidavit because based on scientific calculations exposure dosages that have been calculated on each of these individuals would have been more than sufficient to meet the threshold based on the applicable scientific literature, sufficient to result in the medical conditions that I have diagnosed. Further specific dosage and exposure information regarding these individuals is provided below.

12. "By listing of each of the individuals per source of the toxins (see Exhibit B) are as noted found above I will now detail the circumstances of the exposure more specifically. Based upon my review of the data provided to me, none of the foregoing individuals was provided by the defendants with adequate safety equipment (in most cases none) in connection with their employment related tasks. The employment of the above named individuals were relatively uniform laborer occupations which required them to: Handle ore, dispose of toxic waste materials or contact toxic chemically saturated radioactive dust/water. The specific chemicals and

toxic materials that have been identified in response to the Magistrate Judge's request specifically utilized at the locations denominated in Exhibit B are found in the table of chemicals and toxic materials, and related hazardous material sheets, identified as Exhibit C.

13. "Both the ore itself and the chemicals used to extricate it and process it are highly toxic. Radioactive dust would be both respirated into the individual's lungs and be ingested orally as well due to any occasional contact of the hands which are coated in dust and chemical residue with the mouth. Furthermore, spouses of the mining and mill workers, identified in this supplement as Group 2 and their children, identified in this supplement as Group 3, were subjected to daily contact with highly toxic materials as a result of the chemically saturated particles of dust and "yellowcake" particles and mud clinging to the miner and mill workers' clothing, boots, work gear, tools and vehicles when they returned to their residences. Moreover, many of the plaintiffs indicated to me that they drove loads of unsecured radioactive and toxic materials through the Karnes County and Bee County communities, depositing spillage.

14. "At the conclusion of a work period the worker, as required by their employers, brought home their work gear, tools, vehicles, etc. for cleaning or maintenance. Therefore their residences received low dosage exposure on a chronic basis. Thus

the workers received additional dosages and exposures while they were away from their work in and around the mines/mills, even while in their residences. This same mode of exposure applies as well to plaintiffs not employed in the mines or in the milling process.

Plaintiffs Not Employed by the Mines and Milling Process.

15. "The following individuals based on a review of social histories and information were not employed directly in the mines or in the milling processes. In accordance with the U.S. Magistrate Judge's request to provide geographical location information to the defendants which was adsent in my previous affidavits attached hereto is a complete address location listing of the above described plaintiffs, called Exhibit D. Specific information and circumstances as to how each of these plaintiffs were injured and what the defendants did to cause such injuries in addition to paragraphs below.

16. "This information again is in response to the Magistrate's Order requesting correlation of geographical groups or groupings of plaintiffs to certain facilities and operations. First, documentary data well known to the defendants indicates that a great deal of blasting activity occurred throughout, which affected the entire plaintiffs' geographical community, in pursuit of mining activities. These blasting activities forced particles of silia into the atmosphere which liberally coated the geographical area in

general. This information has been provided to me in part in my screenings and discussions with literally hundreds of witnesses. Moreover, the tailings ponds in each of these facilities did not properly contain dust and debris because the defendants utilized only a cursory methods in wetting down these materials. This resulted in additional problems. By using contaminated water containing chemicals listed in Exhibit C and spraying large areas of open surface mines, the ground became saturated with these highly toxic radioactive materials and chemicals. Thereafter, when the ground dried and became dust, these toxins were spread by wind and other atmospheric conditions. Numerous witnesses have reported to this examiner that on many occasions clouds of this dust were carried through the plaintiffs' communities. Although the miners themselves were the primary recipients of this dust, residents throughout the community also breathed this radioactive or other toxified dust saturated in the toxic Chemicals mentioned in my earlier affidavits. Moreover, the wives of the mining and mill workers and their progeny) and their children were subjected to contact on a daily basis with the clothing of the miners and mill workers themselves and the dust that they brought into their houses once again saturated with these materials.

17. "Specifically, this type of dust is from the substance known as "yellow cake" which is the highly concentrated, milled refined ore. To document the aforementioned, a

plethora of information and documentation compiled by the Texas Department of Health and other official state agencies details and documents toxic levels of, among other compounds: 1) molybdenum, 2) cadmium, 3) ammonia, and 4) selenium, as well as heavy metals in the soil in and around the mines, mills, and tailing ponds. There are sworn statements as well as my interviews with miners and their families describing the ingestion of yellow cake (U308) as well as dust storms of yellow cake (U308) coating their homes, cars, gardens, furniture, etc. There is William Au, Ph.D.'s (1995) peer reviewed, published study indicating biomarkers of cellular damage pointing to toxic levels of uranium in the environment. Dr. Au obtained essentially the same results of cellular damage as I did utilizing a different, equally scientifically accepted methodology, as well as a different sub-population from the same community. Moreover, in the course of conducting his study he took soil samples around the Karnes coutny communitie. Among his findings was the presence of significant levels of uranium dust on lawns in the Karnes county area far removed from the mines.

"Ballantyne (1992) notes with reference to the aforementioned;

"The inhalation exposure of chemicals may be modified by . . . particulates [which] may aborbed other materials which can be inhaled. When trace quanitites of highly volatile and toxic materials are present in a mixture, they may have significan influence on toxicity and hazard" (p. 18)

> SOURCE: Chapter 2, "Basic Principles of Toxicology," Bryan Ballantyne and John B. Sullivan, from Hazardous Material Toxicology.

"Polycyclic aromatic and chlorinate hydrocarbons are examples of highly volatile and toxic materials which are known to be both present and utilized in uranium milling and mining. (Merritt, 1971) (Health Physics Society, 1983) Over time these materials were released into the air attached to uranium dust, thus exposing both miners and residents of the surrounding community on multiple occasions to higly tocix compounds.

"Specifically, this type of dust is known as "yellowcake", which is scientifically defined as follows: Triuraniumoctoxide. Other highly toxic and hazardous powders, e.g., copper sulphate, and microcrystalline compounds, (Lewis, 1992), also became airborne and contaminated the entire area. Dr. Au states in his peer reviewed article (1997), "Distribution of Uranium-238 and Thoium-238 in Environmental Samples in a Residential Area Impacted by Mining and Milling Activities", which has been accepted for publication in Environmental Toxicology and Chemistry:

"The northern region of Karnes coutny, Texas has been the site of extensive mining/milling of uranium for over 30 years. A previous study in our laboratory indicates that residents living near these facilities have increased chromosomal aberrations and a reduced DNA repair capacity, in this study, the long-lived radionuclides uranium-238 (238U) and thorium-232 (232Th) were measured in order to evaluate the contamination from mining/milling facilities. 232Th was quantified simultaneously and served as a reference. Soil samples (n-66) were collected from selected households. Sites located over 14 Km from the study area with no known history of mining/milling served as the control. In the control area, 238U concentrations in soil were consistent between surface (0.13-0.26 mg KG-1) and sub-surface (0.13-0.23 mg Kg1-) samples. Near mining/milling sites, 238U in surface soil (1.11-1.97 mg Kg-10 was found to be consistently and statistically higher (p, 0.05) than corresponding sub-surface samples (0.17.2.11 mg Kg-1). Near mining-only area 238U in surface soil (1.11-1.97 mg Kg-1), however, was not significantly increased over subsurface soil (0.96-1.96 mg Kg-1). As expected, 238U was much higher overall in the mining/milling and mining-only areas saturatd with other chemicals mentioned by earlier affidavits and noted in Exhibit C.

"Dosages"-Exposures

18. "A request has been made regarding the "dosages", in a description of each respective chemical as well as accepted information regarding the toxic dosages of these chemicals and toxic materials and description of the disease producing sequentially

from exposure. The herculean task of assigning dosages to the plaintiffs within a degree reasonable probability has been accomplished using accepted scientific methodology. In particular, soil sample testing for radioactivity was extensively carried out by Dr. William Au of the University of Texas Medical Branch in Galveston. Dr. Au is one of the most preeminent molecular biologist toxicologists in the world today. A complete description of Dr. Au's work in this geographical area was commissioned at the request of the Texas Department of Health and can be found in his published and peer reviewed article written in conjunction with John Hopkins University and copies of which the defendant has already obtained but may be furnished upon request if necessary. The abstract that leads to the main comprehensive article was quoted in paragraph 16 above. Additional soil sample testing regarding the chemical exposures referred to above were analyzed by independent laboratory analysis. The soil samples were taken in the appropriate manner at relevant geographical areas consistent with the type of exposures that have been enumerated in this supplemental affidavit. These values were compared with the values set forth in the universally accepted peer reviewed articles and the specific maladies and disorders suffered by the plaintiffs in this case. Specific examples dealing with the previous identified toxic substances causing harm to the plaintiffs in this case are as follows, with the remainder of the toxic substances and specific dosages are found in Exhibit C: By example, Molybdenum dosage 1-19 mg/day over a period of three to seven years causes pneumoconiosis. By way of illustration one milligram is approximately no more than only a thimble full of material, over a day for three years exposure is all that is required to result in pneumoconiosis. The individuals in Group 1 suffering from silicosis all were unprotected from respirating or ingesting this material for exposure periods exceeding three years with the exception of one individual who had a one year exposure while inhaling higher concentrations, which were available based on the sample testing.

"Consistent with the sample testing conducted at the request of the Texas Department of Health by Dr. William Au and other sample testing, the individuals in the foregoing enumerated groups received dosages in excess of the thresholds contained in Exhibit C.

"Based on patient reporting to this examiner the description of contact with yellowcake and contaminated soil and water could be quantified for purposes of determining dosages. Patients uniformly reported that they had come into daily contact for periods exceeding one year with the foregoing in an amount which has been quanitified to be approximately 175 cubic millimeters which approximates the volume of a thimble, for illustration purposes. The amount of material exposure per day to the toxic materials contained in Exhibit C necessary to cause the plaintiffs' specific maladies in this case as listed would be no greater than this amount.

"Individuals reported larger quanities of materials contact and thus exceeded the threshold necessary by an even greater amount by even a greater dosage. Moreover, peer reviewed literature clearly indicates that a mixing of these toxins requires less dosage and exposure level than exposure to these toxins singularly.61

Silicosis

19. "In addition to the foregoing tests as previously mentioned, individuals were specifically tested for silicosis.

"This supplemental affidavit is made in part as a result of consultation with Dr. Kenneth James Ratajczak, M.D. who is board certified in Radiology by the American Board of Radiology, with the specific medical subspecialty in medicine known as "B"-Reading evaluation. This is the specialty in the field of diagnosing asbesotisis, silicosis and other fibrotic conditions of the lungs.

"Individuals whose names follow below have been specificaly diagnosed by Dr. James Ratajzak as having the condition known as pneumoconiosis, which is defined as a fibrotic condition of the lungs. actual radiographic confirmatory data clearly establishes the presence of fribrotic masses in the lungs consistent with exposure to the defendants' mining/milling activities, which have been previously described.

Alejandra Arrisola
Teresa Cantu
Sally Coronado
John Llamas
Elojio Morin
Joe Luis Rodriquez
Isidro Rossett
Jesus Villanueva
Raymond Yosko

"Additionally, Dr. Ratajczak also diagnosed a group of individuals, who are suffering from pre-pneunoconiosis. He stated that this condition will, in all likelihood, develop into full-blown pneumoconionsis. The following is a list of those individuals.

Porifirio Arquellez
Carlos Castaneda
Thomas Cisneros
Maria Macias
Antonio Olveda
Crespin Perez
Andres Rodriquez
Aurora Tijerina
Luciano Villarreal

"Dr. Ratajczak also diagnosed a group of plaintiffs, who had pulmonary injuries, which are, within a reasonable medical probability, related to exposure to chemicals and other toxic substances in both their employment and residential environments that were generated by te defendants in the course and scope of their mining and milling activities associated with uranium production.

"You should also be advised that I had also had extensive consultation with Dr. Glen Baker, M.D. who is board certified in pulmonology and practices in the subspecialty of medicine known as "B"-Reading evaluation. Dr. Baker, a nationally recognized authority on fibrotic diseases, diagnosed the following individuals as having pneumoconiosis.

Crecensio Acuna
Leonarda Acuna
Juan M. Aleman
Jose Cano, Jr.
Jose Chapa
Rudolfo Cruz
Christopher Curtis
Adam De La Garza
Carl Foley
Andres Garcia
Manuel Gonzales
Venancio Gonzalez
Allan Hedike
Ramon Hinojosa
Roger Le Count
Antonio Lopez
Marciano Morin
Edward Pena
Domingo Rodriquez
Baldamero Salinas
Sisto Sanchez
Victor Serna
Santiago Soliz, Sr.
Johnny Sotello

Juan Suniga
Jacinto Villarreal

"Additionally both Drs. Baker and Rajczak believe, to a reasonable degree of medical certainty, that the lung damage suffered by the affected plaintiffs is directly related to the mining and milling activities of the defendants. Please see their respective individually filed affidavits.

NO OTHER CAUSAL BASIS CAN EXPLAIN THE UNIFORMITY AND SHEER NUMBER OF SPECIFIC DISORDERS OTHER THAN EXPOSURE TO DEFENDANT'S TOXIC MATERIALS, WHICH CLEARLY SUPPORTS PRIMA FACIA SHOWING.

"The incontrovertable blood work demonstrating the sheer number and uniformity of established porphyria alone is prima facia proof that the defendant's toxic materials are the cause. Approximately 43 percent of the adult plaintiffs tested have this condition. The national average in the United States dealing with the prevalence of this disorder is approximately one percent. Thus, the plaintiffs as a group suffer this well known toxically caused condition at a rate of more than 40 fold!

"Silicosis is suffered throughout the general U.S. population by 5 percent of the worker population. Radiographic testing confirms that 38 percent of the plaintiff population in this case suffer from silicosis. What is most incredibly relevant and noteworthy is that testing is still ongoing and to date only 15 percent has even been tested! This remarkable medically demonstrated phenomenon leave no other reasonable explanation for causation other than plaintiffs exposure to the known silicosis causing materials that are utilized, produced and disbursed by the defendants' operations. No other reasonable explanation exists. Clearly this amounts to more than a mere preponderance of proof of causation.

Summary and Conclusion

20. "My opinion is rounded in firm scientific evidence and substantiated by the best scientific literature that is both available and widely accepted. Noteworthy in my medical analysis of each of the above-named individuals is a total absence form the their medical histories, as related to me, of any pre-existing conditions to account for the laboratory results indicating injury. The situation in Karnes County which first drew the attention of the Texas Health Department as a disgrace to the state and which demanded some public action, resulted in the appointment of Dr. William Au whose funding was abruptly cut short when his clinical and scientific data began to substantiate the claims of the individuals living in the community who are truly suffering from sicknesses caused by the defendant's careless and dangerous activities. Clearly, more than enough confirmatory evaluation, testing, sampling and documentation has been performed in this matter that would lead a reasonable individual to the inescapable conclusion that the individuals named in this matter have been medically damaged as a result of the conduct of the Defendants. Moreover, this conclusion in the eyes of a reasonable individual would not merely be as a result of the preponderance of the scientific evidence that exists here but beyond that of reasonable doubt. In this case we have a scientific basis for the harm suffered by these individuals and most importantly there are no other causes which can explain the uniformity of the maladies in this sample population. For example, the proof here that is indicated in the blood work and T-cell damage are

30 times more prevalent than in the general population throughout the United States as a whole! The only conceivable explanation for this must relate to the defendants' activity which in any event has been clearly documented and demonstrated by the work of many other highly qualified and credentialled professionals upon whom I rely.

21. "It is my intention to continue to refine my opinions and make use of whatever further additional information is gathered should that become desirable for purposes merely beyond the cause-and-effect relation that has been proven in this case by an overwhelming preponderance of scientific and medical evidence.

FURTHER, AFFIANT SAYETH NOT.

/s/ C.F. Smith
C.F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 31 day of OCTOBER, 1997, to certify which witness my hand and official seal of office.

Ellen Loomstein
Notary Public in and for the
State of Texas

[SEAL] ELLEN LOOMSTEIN
Notary Public, State of Texas
My Commission Expires
NOV. 8, 1997

EXHIBIT "A"

BIBLIOGRAPHY

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4. Porter, G. A. (1989) *Risk factors for toxic nephropathies.* Toxicol. Lett. 46, pp 269-279.
5. Price, A. (1993) *The repair of ionizing radiation-induced damage to DNA. Semin. Cancer Biol.* 4 pp 61-71.

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Kenneth James Ratajczak, M.D., who being by me first duly sworn, did depose and state as follows:

"My name is Kenneth J. Ratajczak, M.D., I am at least twenty-one years of age and competent to make this affidavit.

QUALIFICATIONS

I am Board Certified in Radiology by the American Board of Radiology. My specific sub-specialty of medicine is what is commonly referred to as "B" reading. This medical sub-specialty is universally recognized in the diagnosis of asbestosis, pneumoconiosis, and other fibrotic conditions of the lungs.

I am a 1972 graduate of the United States Military Academy at West Point. I attended Indiana University School of Medicine, Indianapolis Indiana, where I graduated in 1977. I did my residency at Fitzsimmons Army Hospital in Aurora, Colorado in Diagnostic Radiology.

I am licensed to practice medicine in both Texas and New Mexico.

I hold the following certifications:

1. Diagnostic Radiology

A copy of my current vitae is attached to this affidavit.

In my seventeen (17) years of experience as a Board Certified radiologist and "B" reader, I have examined more than 500 pulmonary x-rays for the purpose of determining asbestosis, pneumoconiosis, and other fibrotic conditions as well as other abnormalities of the lungs.

I was provided with chest X-rays of individuals by C.F. Smith, M.D. I was asked to analyze, assess, and diagnosis those X-rays for specific fibrotic conditions as well as other pulmonary abnormalities.

The following individuals clearly have pneumoconiosis based on confirmatory X-ray diagnosis:

Alejandra	Arrisola	466-46-5272
Teresa	Cantu	455-61-1197
Sally	Coronado	461-60-0511
John	Llamas	450-60-4501
Elojio	Morin	999-99-9999
Joe Luis	Rodriguez	455-11-0330
Isidro	Rossett	463-68-7717
Jesus	Villanueva	450-54-8638
Raymond	Yosko	454-62-0516

The following individuals from the group presented by C. F. Smith, M. D. clearly have pulmonary abnormalities that may be classified as pre-pneumoconiosis:

Porifirio	Arquellez	450-94-5815
Carlos	Castaneda	627-01-9727
Thomas	Cisneros	458-40-2725
Maria	Macias	463-74-2636
Antonio	Olveda	467-96-8127

Crespin	Perez	450-60-9077
Andres	Rodriguez	456-26-6406
Aurora	Tijerina	467-84-7250
Luciano	Villarreal	451-52-8635

It is my opinion, based on reasonable medical probability, and the information provided to me, that these individuals inhaled dusts containing particles of silica, as well as other foreign particles and contaminants (Wang, by-1997). Inhalation of particles of silica is consistent with b-products arising from uranium surface mining (Parmeggiani, 1992).

In my opinion, these mirco-sized particles would have been freely blown about on windy days when dust abatement procedures at the mine site(s) were either not employed or were ineffective for the weather conditions that were present (Wagner, 1994).

Pneumoconiosis is well known occupational hazard of mining in general and Uranium surface mining in particular (Parmeggiani, 1992). Application of dust abatement procedures and issuing of dust masks to individual workers would be minimal steps to avoid the hazards and risks from pneumoconiosis (NIOSH ALERT, 1992).

Additionally, the following patients have abnormal chest X-rays, which are consistent with injury and disease, related to exposure to chemicals, dusts and other pulmonary irritants (Ellerhorn & Barceloux, 1988).

Adolfo	Aguirre	466-82-1318
Lionel	Benavides	459-72-5267
Juan	Cruz	467-44-3328

Julia	Criz	451-52-5811
Marcos	Cruz	454-58-0023
Fidel	Garcia	458-62-1571
Richard	Garza	452-19-1840
Manuel	Mendoza	457-64-3507
Yolanda	Saenz	461-13-3583
Ronald	Strause	457-66-4001

/s/ Kenneth James Ratajczak, M.D.
Kenneth James Ratajczak, M.D.

VERIFICATION

Subscribed and sworn to before me, the undersigned authority, on this 28 day of October, 1997.

[SEAL]
ORA JANE ELLIS
NOTARY PUBLIC
STATE OF TEXAS
My comm. Exp. 7-26-2000

/s/ Ora Jane Ellis
Notary Public for and by the State of TEXAS

My Commission Expires: 7-26-2000

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Glen D. Baker, M.D., who being by me first duly sworn, did depose and state as follows:

"My name is Glen D. Baker, M.D., am over the age of eighteen (18) and am fully competent to make this Affidavit. All facts contained within this Affidavit are within my personal knowledge, subject only to information that I am relying on as an expert.

QUALIFICATIONS

I am board certified in Internal Medicine and Pulmonology. I have additional training in X-ray interpretation with "B" reader Certification, which is for the recognition and diagnosis of asbestosis, pneumoconiosis of different etiologies and other fibrotic conditions of the lungs.

I attended the University of Louisville Medical School from 1964 to 1968 and did my pulmonary residency at the University of Louisville.

I also attended the Mayo graduate School, Rochester, Minnesota for a Fellowship in Internal Medicine.

I first obtained NIOSH Certification for "B" Reader in November 1968. My current certification is from February 1997-January 2001.

I am licensed to practice Medicine in Kentucky.

I have examined more than 8000 pulmonary X-rays in the past 20 years for the purpose of determining asbestosis, pneumoconiosis, and other fibrotic conditions as well as determining other pulmonary abnormalities.

I was provided with chest X-rays of individuals by C.F. Smith, M.D. I was asked to analyze, assess, and diagnosis those x-rays for specific fibrotic conditions as well as other pulmonary abnormalities.

Of the patients X-rays I examined, the following individuals clearly have pneumoconiosis based on confirmatory x-ray:

Acuna,	Crecensio	449-78-1915
Acuna,	Leonarda	457-80-8891
Aleman,	Juan, M.	466-52-1835
Cano, Jr.,	Jose	464-78-3736
Chapa,	Jose	464-64-3714
Cruz,	Rudolfo	449-74-3457
Curtis,	Christopher	454-41-2039
De La Garza,	Adam	457-52-2630
Foley,	Carl	460-13-3747
Garcia,	Andres	454-70-0591
Gonzales,	Manuel	463-92-3236
Gonzales,	Venancio	451-66-9739
Hedike,	Allan	450-60-2813
Hinojosa,	Ramon	458-08-6093
Le Count,	Roger	310-44-5939

Lopez,	Antonio	467-72-5459
Morin,	Marciano	467-88-0660
Pena,	Edward	458-66-4656
Rodriquez,	Domingo	463-74-5586
Rodriquez,	George	463-40-2275
Salinas,	Baldamero	455-02-6564
Sanchez,	Sisto	457-62-9380
Serna,	Victor	463-62-1401
Solis, Sr.,	Santiago	457-52-4793
Sotello,	Johnny	454-62-0107
Suniga,	Juan	463-56-8459
~~Torres, Sr.~~,	~~Mauro~~	~~468-62-3043~~
Villarreal,	Jacinto	449-74-3194

It is my opinion, to a reasonable degree of medical certainty and based on the information provided to me, that these individuals inhaled particles of silica and other micro particles that are consistent with the methods used in uranium surface mining operations. (Parmeggiani, 1992) Additionally, these particles are able to cause the clearly present abnormalities I observed and noted in my examination of their X-rays. (Wang, 1997))

Further, among the chest X-rays of Uranium workers and residents of the area that I examined there was a group who had signs of pneumoconiosis, but had not yet developed the classic patterns looked for on X-ray.

It is medically probable that these individuals may over time develop pneumoconiosis which would be, within reasonable medical probability, related to Uranium mining and milling activities in question:

Aldrich,	Cale	454-74-4215
Caiati,	Vincent	458-04-8475
Castillo,	Guadalupe	451-50-2837
Cortez,	Melquiades	454-44-9098
Cruz,	Felipe	467-96-7800
De Leon,	Alejandro	458-82-2112
De Luna,	Ernesto	458-21-2395
Delgado,	Joe	449-88-8856
Estrada,	Albert	460-56-9989
Harrison,	Donald	157-34-6494
Hinojosa,	Santiago	456-82-6179
Lopez,	Charles	455-02-6818
Mendoza,	Sally	456-84-2527
Olvera,	Arturo	466-88-1342
Salinas,	Manuel	467-44-5437
Smith,	Charles	448-53-8062
Whitney,	Clark	451-35-9662
Ybarra,	Claro	466-90-7040
Zapata,	Samuel, C.	454-70-1900

Additionally, I reviewed chest X-rays, which were abnormal and are consistent with injury and disease, related to exposure to chemicals, dusts and other pulmonary irritants other than silica (Ellerhorn & Barceloux, 1988). These other substances could, to a reasonable degree of medical probability, be related to and arise from Uranium mining and milling activities (Merritt, 1971).

Gabrysch,	Edward	467-96-8347
Green,	Albert	458-66-0473
Villanueva,	Marcos	466-32-0891

/s/ Glen Baker, M.D.
Glen Baker, M.D.

VERIFICATION

Subscribed and sworn to before me, the undersigned authority, on this 28th day of October, 1997.

/s/ Phillis Smith
Notary Public for and by the
State of KENTUCKY
My Commission Expires:
[SEAL]
MY COMMISSION EXPIRES
MAY 23, 1999

STATE OF CALIFORNIA §
§ AFFIDAVIT
COUNTY OF LOS ANGELES §

BEFORE ME, the undersigned authority, on this day personally appeared Aristo Vojdani, Ph.D., M.T., who being by me first duly sworn, did depose and state as follows:

"My name is Aristo Vojdani, Ph.D., am over the age of eighteen (18), a citizen of this country, have never been convicted of a felony and am fully competent to make this Affidavit. All facts contained within this Affidavit are within my personal knowledge, subject only to information that I am relying on as an expert.

QUALIFICATIONS

I am vice president of research and development of Immunosciences Lab, Inc. of Beverly Hills, California. Additionally, I am Associate Professor, Department of Internal Medicine, Charles R. Drew School of Medicine and Science.

I earned a Ph.D. degree in Immunology and Microbiology from Bar Han University, Israel in 1976. I also hold a Bachelor of Science with a major in Microbiology and a minor in Biochemistry, and a Master of Science with a major in Microbiology and minor in Immunology. Both degrees were granted by Bar Han University, Tel Aviv, Israel.

From 1976-1978, I did post-doctoral training in Cellular Immunology at Tel Aviv University Medical Center, Assaf Harofe Hospital.

From 1979-1981, I did post-doctoral training in Comparative Immunology Research at the University of California, Los Angeles.

I have conducted more than 20,000 laboratory analyses of immunological and immunocoxicological functioning in the past twenty-two years for the purpose of determining immunological dysfunction and cellular abnormalities.

I was provided with laboratory samples from individuals by C.F. Smith, M.D. I was asked to analyze and assess these samples for cellular abnormalities and immune system dysfunction.

Immunosciences Laboratory's testing is based on standard, accepted laboratory procedures that were surveyed by the College of American Pathology.

It is my opinion, to a reasonable degree of medical/scientific certainty and based on the information provided to me, that these individuals inhaled or consumed particles of radioactive uranium, silica and other micro particles that are consistent with the methods used in uranium surface mining operations. (Parmeggiani, 1992) In addition to these particles of highly toxic substances, these individuals were also exposed to toxic chemicals, which are not only capable of altering immune system functioning, but are also able to cause the clearly present abnormalities I observed and noted in my examination of laboratory blood samples. A complete bibliography documenting the science is attached to this affidavit.

Further, Affiant sayeth not.

/s/ Aristo Vojdani
Aristo Vojdani, Ph.D., M.T.

VERIFICATION

Subscribed and sworn to before me, the undersigned authority, on this 30th day of October, 1997.

(LOGO) ALLEN R. RENO
Commission # 1118908
Notary Public – California
Los Angeles County
My Comm. Expires
Dec. 30, 2000

/s/ Allen R. Reno
Notary Public for and
by the State of
CALIFORNIA

My Commission Expires
12/20/2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA, *
et al., *
Plaintiffs, * CIVIL NO.
* SA-96-CA-543-0G
v. *
BROWN & ROOT, et al., *
*
Defendants. *

MEMORANDUM AND RECOMMENDATION

(Filed Feb. 2, 1998)

This is a mass-tort case involving approximately 1100 plaintiffs. Due to the nature of this case, the undersigned imposed an atypical scheduling order that required plaintiffs to show, by affidavits from experts, a prima facie case of causation for specific injuries that plaintiffs allegedly suffered. The scheduling order set forth the requirements for establishing a prima facie case of causation. Defendants seek dismissal of plaintiffs' claims for failure to comply with the scheduling order because plaintiffs have not complied with the requirements for establishing a prima facie case of causation. Before the Court is defendants' supplemental motion to dismiss, or alternatively, motion for partial dismissal. Docket no. 72. Upon consideration, the undersigned will recommend that all of plaintiffs' claims be dismissed for failure to comply with that part of the scheduling order requiring plaintiffs to submit affidavits that establish a prima facie case of causation for all aspects of their alleged damages.

Background

The Court entered a scheduling order (docket no. 54) requiring plaintiffs to submit affidavits establishing a prima facie case of causation of their alleged injuries before discovery would be permitted. The unique and complex nature of a toxic tort case such as this, with approximately 1100 plaintiffs, serves as the reason for such a requirement. The scheduling order required plaintiffs to provide affidavits establishing causation for each plaintiff's personal injuries and property damages.

In regard to each plaintiff's claim for personal injuries, plaintiffs were required to produce affidavits from qualified experts that:

> 1) List all injuries, illnesses or conditions suffered by the plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation;
>
> 2) Specify the material(s) or substance(s), that, in the opinion of the expert, caused each injury, illness or condition listed and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);
>
> 3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e., ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and
>
> 4) State the scientific and medical bases for the expert's opinions.

In their original attempt to comply with the scheduling order, plaintiffs tendered to defendants 1058 affidavits from the same medical doctor. In *Defendants' Motion To Dismiss Or, Alternatively, To Enforce Scheduling Order* (docket no. 59), defendants argued that plaintiffs failed to provide the affidavits from experts as required by the scheduling order. In their motion, defendants sought dismissal of all claims for failure to comply with the scheduling order, or an order enforcing the scheduling order. The undersigned found that plaintiffs' initial submission of affidavits did not satisfy the requirements of the scheduling order because of their conclusory and speculative nature. The undersigned entered an order (docket no. 62) that granted the motion to enforce the scheduling order. The order enforcing the scheduling order, which was affirmed by the District Court (docket no. 74), pointed out how plaintiffs' submissions failed to comply with the scheduling order, and provided plaintiffs another opportunity to comply with the Court's scheduling order. Plaintiffs next provided affidavits and copies of lab reports to defendants, who then filed the "supplemental" motion to dismiss for failure to comply with the scheduling order. The undersigned must determine whether plaintiffs' latest submissions comply with the Court's scheduling order, and whether dismissal is appropriate if plaintiffs have not complied with the order.

Discussion

1. Plaintiffs' Latest Submissions.

In response to the Court's order requiring plaintiffs to comply with the scheduling order, plaintiffs submitted to defendants four sworn affidavits and copies of numerous lab tests. The affidavits are from Glen D. Baker, M.D., Kenneth James Ratajczak, M.D., Aristo Vojdani, Ph.D., M.T., and Charlie F. Smith, M.D. All affidavits are short, except for the Smith affidavit.

Dr. Baker, who is board certified in internal medicine and pulmonology, stated in his affidavit that he analyzed chest x-rays for specific fibrotic conditions. Dr. Baker did not indicate the number of x-rays that were involved or the number of plaintiffs in this case whose films he analyzed. His affidavit states that x-rays reveal pneumoconiosis[1] in 27 individuals[2] and abnormalities in 22 others[3]. ***Response,*** Baker Aff. It is Dr. Baker's opinion that the individuals with pneumoconiosis inhaled particles of silica and other micro particles that are consistent with the methods used in uranium surface mining operations. ***Id.*** Dr. Baker also stated that those inhaled particles are able to cause the abnormalities he noted. ***Id.*** Nothing is mentioned in the affidavit about the over-1000 other plaintiffs in this case.

Dr. Ratajczak, who is board certified in radiology, stated in his affidavit that he analyzed chest x-rays for specific fibrotic conditions. Dr. Ratajczak did not indicate the number of x-rays that were involved or the number of plaintiffs in this case whose films he analyzed. His affidavit states that x-rays reveal pneumoconiosis in 9 individuals[4] and abnormalities in 19 others[5]. ***Response,*** Ratajczak Aff. It is Dr. Ratajczak's opinion that the individuals that have pneumoconiosis or "pre-pneumoconiosis" inhaled dusts containing particles of silica, and that inhalation of silica is consistent with by-products arising from uranium surface mining. ***Id.*** Dr. Ratajczak also opines that the inhaled particles would have been freely blown about on windy days when dust abatements procedures at the mine sites were not used or were ineffective. ***Id.*** Nothing is mentioned in the affidavit about the over-1000 other plaintiffs in this case.

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[1] According to Dr. Smith, pneumoconiosis is defined as a fibrotic condition of the lungs. According to Dr. Ratajczak, pneumoconiosis is a well known occupational hazard of mining in general and uranium surface mining in particular.

[2] Defendants' motion indicates that 13 of the 27 are plaintiffs in this case.

[3] Defendants' motion indicates that 12 of the 22 are plaintiffs in this case.

The third affidavit is by Dr. Vojdani, who holds a Ph.D. degree in immunology and microbiology. In his affidavit, Dr. Vojdani states that he has conducted over 20,000 laboratory analyses over the past 22 years for the purpose of determining immunological dysfunction and cellular abnormalities. ***Response,*** Vojdani Aff. Dr. Vojdani analyzed an unspecified number of laboratory samples of an unspecified number of individuals for cellular abnormalities and immune system dysfunction. He concluded that the individuals inhaled or consumed particles of radioactive uranium, silica and other micro particles that are consistent with the methods used in uranium surface mining operations. ***Id.*** Dr. Vojdani also stated that the exposure to the chemicals can cause the abnormalities that he "noted in [his] examination of laboratory blood samples." ***Response,*** Vojdani Aff. Nothing in Dr. Vojdani's affidavit identifies either the plaintiffs tested or the abnormalities generally mentioned in his affidavit.

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[4] Defendants' motion indicates that 7 of the 9 are plaintiffs in this case.

[5] Defendants' motion indicates that 15 of the 19 are plaintiffs in this case.

Dr. Smith's affidavit is comprised of 13 pages, exclusive of Exhibits A through D and 12 groups of lab and diagnostic reports. In his affidavit, Dr. Smith states his medical opinion that the plaintiffs are suffering from the medical conditions listed in his affidavits previously submitted to the defendants that the Court found lacking. ***Response,*** Smith Aff., p. 1. The affidavit also discusses the testing performed, and it groups 877 of the approximately 1100 plaintiffs into two categories: those that had direct exposure in the uranium mining and milling process as a result of their employment, and those not employed in the mines or milling processes. ***Id.*** at pp. 3-5. The affidavit states that those persons exposed to the mining and milling operations encountered particles of radioactive dust. ***Id.*** According to Dr. Smith's affidavit, that dust was inhaled and ingested by the workers, and it adhered to their clothing and tools that were brought home, thus causing family members of the workers to breathe and ingest the dust. ***Id.*** at pp. 4-5. Smith also opined that the toxic dust was spread throughout the geographic area by wind, thus causing those not employed in the mining and milling processes to inhale[6] the dust. ***Response,*** Smith Aff., pp. 5-7. The affidavit next discusses dosages of dust, silicosis, followed by Dr. Smith's summary and conclusion. *Id.* at pp. 8-12.

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[6] In Dr. Smith's discussion of dosages (Smith Aff., p. 9), he briefly mentions soil and water contamination.

2. Requirement 1 – Identification Of Each Plaintiff's Injuries.

The Court's scheduling order required plaintiffs to provide expert affidavits that list all injuries, illnesses or conditions suffered by each plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation of one or more of the defendants. Dr. Smith's affidavit states that the plaintiffs are suffering from the medical conditions listed in his affidavits previously submitted. It is inconceivable how that complies with this requirement because the Court found Dr. Smith's previous affidavits to be lacking.[7] The previous affidavits were deficient because they did not specifically identify each plaintiff's injuries. Therefore, Dr. Smith's reference to his previous affidavits does not comply with the requirement of the scheduling order to specifically list all injuries, illnesses or conditions suffered by each plaintiff.

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[7] In the order enforcing the scheduling order, the undersigned noted that each of the 1058 affidavits stated that "the plaintiff's exposure to toxic substances was sufficient to cause a variety of conditions, and caused *some or all* of a list of injuries." ***Order Enforcing Scheduling Order,*** Docket no. 62, p. 3. The undersigned found that the affidavits did not comply with the requirement to list injuries, illnesses or conditions suffered. *Id.* Plaintiffs were advised that the scheduling order required affidavits that provide the specific injuries, illnesses or conditions suffered by each plaintiff. *Id.* at pp. 3-4.

Instead of identifying the specific injuries, illnesses or conditions suffered by each plaintiff, information has been provided to support Dr. Smith's general statement of the injuries suffered by plaintiffs. Attached to the Smith Affidavit are copies of lab reports and diagnostic tests that are organized into 12 groups. The order enforcing the scheduling order advised plaintiffs that the identified injuries suffered by plaintiffs must be supported by the scientific and medical bases for each opinion, along with the name and result of tests conducted. Submission of test results is meaningless without the identification of injuries suffered by each plaintiff, especially since the Smith Affidavit only briefly mentions three of the twelve groups.

The only other information that relates to the requirement to specifically identify claimed injuries is the discussion in the Smith Affidavit regarding silicosis. ***Response,*** Smith Aff., pp. 9-11. Dr. Smith's discussion of silicosis is essentially a summary of the affidavits of Drs. Ratajczak and Baker. As previously indicated, Drs. Ratajczak and Baker identified only 36 individuals with pneumoconiosis and another 41 with abnormalities like "pre-pneumoconiosis." No expert affidavit provides any specific information as to the approximately 1000 other plaintiffs.

Therefore, the undersigned finds that the affidavits from plaintiffs' experts do not comply with the requirement to identify the specific injuries, illnesses or conditions suffered by each plaintiff as a result of exposure to materials or substances from a facility or operation of a defendant.

3. Requirement 2 – Identification of Injury-Causing Substances.

The scheduling order also required plaintiffs to provide expert affidavits that specify any materials or substances that, in the opinion of the expert, caused each injury, illness or condition suffered by each plaintiff. As to this requirement, the scheduling order also required that the affidavits identify the particular facility or operation alleged to be the source of the materials or substances.

Attached to the Smith Affidavit is Exhibit C, which is a listing of 14 chemicals and materials used in the defendants' mining and milling of uranium, along with a list of the injuries that they can cause. Included with that listing is specific information about the properties of the chemicals and materials identified in that listing.

The only affidavit that addresses this requirement is the Smith Affidavit. It states that exposure to the materials contained in Exhibit C caused "the plaintiffs' specific maladies in this case." ***Response,*** Smith Aff., p. 9, par. 18. From that affidavit, it appears that all plaintiffs have been exposed to all materials in Exhibit C, which resulted in their injuries. The only specific injuries noted in the affidavits before the Court are pneumoconiosis and a pre-pneumoconiosis condition that were found in only a small sub-set of plaintiffs. According to Exhibit C, pneumoconiosis is not an injury that can result from exposure to every material in Exhibit C.

There are no affidavits from experts that specifically identify the injuries of each plaintiff, so it is inconceivable how Dr. Smith's general statement regarding causation can satisfy the requirement to identify the specific materials or substances that caused each individual injury. The inadequacy of Dr. Smith's affidavit is underscored by information in Exhibit C that indicates that, as to some materials, the only identified injury is not considered to be a known injury that can result from exposure to such materials. Also, no attempt is made in any affidavit to comply with that part of the second requirement that requires an expert to identify the particular facility or operation alleged to be the source of the materials or substances that caused the alleged injuries. Therefore, the undersigned finds that the affidavits from plaintiffs' experts do not comply with Requirement 2.

4. Requirement 3 – Frequency, Method and Dosage of Exposures.

The scheduling order requires affidavits from experts showing the frequency, method and dosage of each plaintiff's exposure to materials or substances that caused their specific injuries. Dr. Smith's affidavit is the only affidavit that addresses this requirement.

In regard to the persons that had direct exposure to the mining and milling processes, normally in "uniform laborer occupations," Dr. Smith opined that radioactive dust would be ingested and inhaled. ***Response,*** Smith Aff., p. 4. The spouses and children were subjected to daily contact with toxic materials as a result of dust, called "yellowcake" by Dr. Smith, that would cling to the workers clothes, boots, tools and vehicles when they returned to their residences. ***Response,*** Smith Aff., pp. 4-5. Curiously, Dr. Smith opined that this is the same mode of exposure applies to plaintiffs not employed in the mines or milling processes. *Id.* at p. 5, par. 14. Despite that opinion as to their method of exposure, Dr. Smith opined that those persons not so employed were exposed to toxic dust as a result of blasting activities that forced dust into the air and covered the geographic area "in general." *Id.* at p. 5, par. 16. According to Dr. Smith, the dust spread by the wind was inhaled by "residents throughout the community. *Id.* at p. 6, par. 16.

Dr. Smith stated that "a plethora of information and documentation compiled by the Texas Department of Health and other official state agencies" details toxic levels of compounds and metals in the soil in and around the mines and mills, but no such information accompanies his affidavit. *Id.* at p. 6, par. 17. Dr. Smith refers to a published study performed by William Au, Ph.D., indicating "biomarkers of cellular damage pointing to toxic levels of uranium in the environment." *Id.* According to Dr. Smith, Dr. Au is a preeminent "molecular biologist toxicologist" whose findings were based in part on soil samples from around the Karnes County community that reflected the presence of significant levels of uranium dust on lawns "far removed from the mines." *Id.* Dr. Smith did not attach a copy of Dr. Au's published article to his affidavit.

In regard to dosages, Dr. Smith refers to Dr. Au's study and opines that individuals in "Group ___"[8] were exposed to a molybdenum dosage of 1-19mg/day over a period of three to seven years, which caused pneumoconiosis in those individuals. ***Response,*** Smith Aff., p. 8. In that regard, Dr. Smith stated that exposure to only 1 mg/day for three years is all that is required to result in pneumoconiosis. ***Id.*** In a paragraph that appears to pertain to all other plaintiffs and all other injuries, Dr. Smith opined as follows:

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[8] Attached to the affidavit are copies of lab reports and diagnostic tests that are divided into 12 groups. The affidavit does not indicate which of the 12 groups is being referenced.

> *Based on patient reporting to this examiner* the description of contact with yellowcake and contaminated soil and water could be quantified for purposes of determining dosages. Patients uniformly reported that they had come into daily contact for periods exceeding one year with the foregoing in an amount which has been quantified to be approximately 175 cubic millimeters which approximates the volume of a thimble, for illustration purposes. The amount of material exposure per day to the toxic materials contained in Exhibit C necessary to cause the plaintiffs' specific maladies in this case as listed would be no greater than this amount.

Id., at p. 9 (emphasis added). Dr. Smith makes another conclusion as to exposure dosages when discussing the frequency and method of exposure to substances:

> Since each of these above-named individuals worked in the mining/milling operations for no less than six months and to a maximum of 30 years it will not be necessary to list each plaintiff's length of employment in this affidavit because based on scientific calculations exposure dosages that have been calculated on each of these individuals would have been more than sufficient to meet the threshold based on the applicable scientific literature, sufficient to

> result in the medical conditions that I have diagnosed.

Response, Smith Aff., p. 4 , par. 11.

In regard to the requirement to provide affidavits regarding the frequency, method and dosage of exposures, the Court notes that the plaintiffs' reliance upon the published article by Dr. Au is appropriate. Discovery was stayed because of the availability of public information regarding information that can be used by plaintiffs to establish a prima facie case of causation of their injuries. However, Dr. Smith's reference to Dr. Au's findings is questionable for this reason: Dr. Au found uranium dust on lawns in the Karnes County community, whereas Dr. Smith concluded that certain individuals were exposed to molybdenum in sufficient dosages and frequency to cause pneumoconiosis.

More important, however, is that plaintiffs rely only on the opinion of Dr. Smith, a medical doctor, to establish that the exposure of certain individuals to molybdenum was sufficient to cause pneumoconiosis. Plaintiffs were advised in the order enforcing the scheduling order that an expert can only provide an expert opinion regarding subjects within his area of expertise. Dr. Smith indicated that Dr. Au had expertise as "molecular biologist toxicologist," but Dr. Smith did not indicate that he has similar expertise that would qualify him as an expert in regard to toxicology. Therefore, Dr. Smith's statement about the exposure of certain individuals to molybdenum cannot be considered an expert opinion.

Plaintiffs also rely on another opinion of Dr. Smith that is outside of his area of expertise in what appears to regard all other individuals and all other maladies. Dr. Smith concluded that plaintiffs had sufficient exposure to the toxic materials contained in Exhibit C necessary to cause the plaintiffs' specific maladies, based on "patient reporting" to him. That conclusion was based on plaintiffs' contact with yellowcake and contaminated soil and water. Dr. Smith is not a hydrogeologist, microbiologist, toxicologist or expert whose opinion could be used to establish whether a certain dosage, method and frequency of contact is sufficient to cause certain injuries. Instead, Dr. Smith's opinions should be limited to conclusions regarding the current medical conditions of plaintiffs and the causes of plaintiffs' conditions based on reasonable *medical* probability.

Dr. Smith also provided a statement beyond his expertise regarding dosages when discussing the frequency and method of contact with toxic substances by individuals who worked in the mining/milling operations. Dr. Smith opined that it is not necessary to each plaintiff's length of employment because each plaintiff's exposure was sufficient to result in the medical conditions he diagnosed. It is possible that that opinion cannot be relied upon for the additional reason that Dr. Smith failed to provide the basis for his opinion. ***See Rosado Deters,*** 5 F.3d 119, 124 (5th Cir.1993)(accident reconstruction expert properly excluded where "he could not independently establish the necessary physical and mathematical bases for his opinion"). Plaintiffs were advised in the order enforcing the scheduling order that they must provide the scientific and medical bases for each opinion. Attached to Dr. Smith's affidavit is Exhibit B, which contains a listing of the various plaintiffs' dates of employment with specific employers. Although this could be considered a basis for Dr. Smith's conclusion, he has not indicated which materials or substances came from the various sites.

For those not employed in mining/milling operations, Dr. Smith opined as to their pathways of exposure, and concluded that their exposure was sufficient to cause their individual maladies. Dr. Smith's opinion about the means of exposure is beyond his medical expertise. Dr. Smith's conclusion in this regard is not proper for the additional reason that he only provided the current address for those individuals rather than providing the location of their residence during the times that mining/milling operations were active. ***Response,*** Smith Aff., Exh. D. The irrelevance of the listing of current addresses is underscored by addresses in cities located very long distances from Karnes County, such as San Antonio, Seguin, Austin and Ft. Worth. In the order to enforce the scheduling order, plaintiffs were advised of the need for relevant residence information.

5. Non-compliance With The Scheduling Order.

For the reasons set forth above, the undersigned concludes that plaintiffs have not complied with the scheduling order. Plaintiffs were required to submit affidavits from experts showing for each plaintiff the nature of injuries, the specific cause of the injuries and which facilities or operations substantially contributed to the cause. The purpose of the affidavits was to establish causation and to enable correlation of any geographic group or groupings of plaintiffs to certain facilities or operations. Plaintiffs have not attempted to make such correlation, and none is possible from what plaintiffs have submitted as their purported prima facie proof of causation of plaintiffs' injuries.

In regard to property damages, no affidavits were submitted to show the type of damages or the causation of such damages. Plaintiffs were advised that the failure to provide affidavits regarding property damages would be considered waiver of the property damage claims. Therefore, the undersigned concludes that the property damage claims were waived by plaintiffs.

6. Authority For Dismissal.

Having concluded that plaintiffs failed to comply with the Court's scheduling order, the focus turns to defendants' request for dismissal. Rule 16(f) provides that if a party fails to obey a scheduling order, the Court "may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D)." Fed.R.Civ.P. 16(f) (1998). Rule 37(b)(2)(C) provides authority for the Court to dismiss this case as a sanction for plaintiffs' failure to comply with the scheduling order. The Court may not, however, impose the extreme sanction of dismissal under Rule 16(f) unless the Court first finds that a lesser sanction would not serve the interests of justice. ***Bann v. Ingram Micro, Inc.,*** 108 F.3d 625, 627 (5th Cir.1997). "Dismissal with prejudice is a drastic remedy to which a court may resort only in extreme situations where there is a clear record of delay or contumacious conduct by the plaintiff." ***Id.***

Below is a discussion of several factors to aid the Court in exercise of its discretion.

Considering the issue of delay, the undersigned notes that the scheduling order was entered on April 11, 1997. Docket no. 54. The scheduling order was imposed after careful consideration of the arguments and authorities presented by the parties. The scheduling order required plaintiffs to produce to defendants the affidavits from experts on or before July 11, 1997. On September 16, 1997, the undersigned entered an order that granted the motion to enforce the scheduling order. Docket no. 62. That order set forth in detail the deficiencies in the affidavits submitted by plaintiffs to defendants. That order also directed plaintiffs to provide appropriate affidavits to defendants on or before October 31, 1997. On December 1, 1998, the defendants filed their motion to dismiss that is under consideration. It has been over nine months since plaintiffs were originally required to produce affidavits to defendants. Even after having been provided a critique of the first submission, along with specific advice regarding what plaintiffs needed to comply with the scheduling order, plaintiffs have again failed to comply.

It does not appear that plaintiffs have been constrained by a lack of time because it has taken over nine months to get to this point and plaintiffs have not raised that issue in their response to the motion. Instead, the arguments in plaintiffs' pleadings to this point express the view that it is unfair to require plaintiffs to show causation. This issue has been addressed at length by the undersigned and the District Court, and it does not serve as an excuse for delay. According to the scheduling order, the progress of this case remains halted until there has been a showing by plaintiffs of causation of their injuries.

The extremely deficient attempt by plaintiffs in their latest submission of affidavits indicates that plaintiffs have not put forth a sincere effort to comply with the scheduling order. Despite the numerous documents tendered in response to the order enforcing the scheduling order, the undersigned is left with the impression that plaintiffs did not intend to comply. The deficiencies in the latest submissions are the same in nature as the previous submissions: they are conclusory, the opinions of experts are not confined to their area of expertise, no attempt has been made to identify the specific injuries alleged suffered by each plaintiffs, and no attempt has been made to identify which operations or facilities of defendants have substantially contributed to each plaintiffs' specific injuries. Plaintiffs have no excuse for the delay they have caused, and it is not apparent that plaintiffs would comply with the scheduling order if given yet another chance. For these reasons, the undersigned believes that this factor favors dismissal.

If the case is allowed to proceed, then defendants will suffer great prejudice. Defendants will be required to expend extensive time and money defending broad, unspecified claims as to which no preliminary showing of liability or damages has been made. If this case were to proceed to the discovery process, it is certain that defendants would request identification of each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. If plaintiffs' experts are not able to provide that information, then plaintiffs's discovery responses will not facilitate a firm and reliable basis upon which defendants can build their defense. Based upon plaintiffs' failure to provide the prima facie evidence at this stage, the Court has no reason to believe they will ever be able to produce that information. Therefore, the undersigned believes that the prejudice to defendants favors dismissal.

Related to the factor of prejudice is the interference with the judicial process. If discovery were to proceed, defendants would most likely file motions to compel the identification of each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. As there are approximately 1100 plaintiffs in this case, the effect on the judicial process would be enormous. At some point in this litigation process, the Court will be required to address the issue of whether plaintiffs have sufficiently identified each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. Addressing this issue later in the litigation process will certainly consume more judicial resources. Considering the demands of a mass-tort case upon the Court, in light of the information available to plaintiffs' experts, the undersigned believes that the interference to the judicial process that would be caused by allowing this case to proceed to discovery favors dismissal for failure to comply with the scheduling order.

The undersigned notes that the burden on plaintiffs was clearly set forth in the scheduling order. Plaintiffs' burden was explained to them in the order enforcing the scheduling order. The undersigned advised plaintiffs why their previous submission of affidavits was inadequate, and advised plaintiffs that their failure to comply would result in a recommendation of dismissal. Only plaintiffs' are responsible for the failure to provide affidavits from experts as required by the scheduling order. The undersigned believes that these factors favor dismissal.

Plaintiffs' were encouraged to comply with the scheduling order by being advised that the failure to comply would result in dismissal. It is inconceivable how a lesser sanction would be effective because what would remain would be an inadequate showing of causation. As discussed above, proceeding to discovery with an inadequate showing of causation will result in the creation of numerous problems of the same character requiring the expenditure of more judicial resources at a later stage in the litigation process. Therefore, the undersigned believes that the ineffectiveness of a lesser sanction favors dismissal.

7. Property Damage Claims.

No affidavits concerning property damage were tendered to defendants, either the first or second time. In the order enforcing the scheduling order, the Court advised plaintiffs' that the failure to submit affidavits supporting property damage claims would be considered waiver of all property damage claims. No explanation has been provided for the failure to provide affidavits regarding property damage. Therefore, the undersigned concludes that all property damage claims should be dismissed under Rule 16(f) for failure to comply with the scheduling order.

Rule 41(b) provides additional authority for dismissing plaintiffs' property damage claims. Rule 41(b) of the Federal Rules of Civil Procedure authorizes dismissal of an action or of any claim against the defendant for failure of the plaintiff to prosecute or to comply with the federal rules or any court order. Clearly, a federal court can dismiss an action for failure to prosecute to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the district courts. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-30, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962). Such a dismissal will be reversed only if the trial court has abused its discretion. *Id.* at 633, 82 S.Ct. at 1390; *Dorsey v. Scott Wetzel Services, Inc.*, 84 F.3d 170, 171 (5th Cir. 1996). The failure to comply with court orders can warrant dismissal for lack of prosecution. *Long v. Simmons*, 77 F.3d 878, 879 (5th Cir. 1996). As a result of plaintiffs' failure to submit any affidavits regarding property damage claims, such claims should be dismissed under Rule 41(b) for failure to prosecute.

Conclusion

Plaintiffs failed to comply with the scheduling order because they submitted affidavits by experts that did not appropriately identify (1) each plaintiff's injuries, (2) the materials or substances that caused each injury, or (3) the operations of defendants that substantially contributed to each plaintiff's injuries. Upon consideration of the appropriate criteria, the sanction of dismissal of all personal injury claims under Rule 16(f) is appropriate.

Plaintiffs failed to submit any affidavit concerning their remaining claims, which are property damage claims, despite being warned that such failure would be considered waiver. Therefore, all property damage claims should be dismissed under Rule 16(f) for failure to comply with the scheduling order, and under Rule 41(b) for failure to prosecute.

This Court does not take lightly the impact that dismissal has on plaintiffs in this case. Perhaps some of the individual plaintiffs have suffered injuries at the hands of one or more defendants. However, despite numerous opportunities, they have failed to provide sufficient preliminary information of any defendants' liability or any plaintiffs' damages resulting therefrom. It is truly unfortunate that they have refused to comply with the scheduling order on the basis of their repeatedly expressed belief that the burdens imposed are unfair. What would be unfair is to require each defendant to defend against every claim by every plaintiff, when it is clearly within plaintiffs' ability at this time to specify what injuries they suffered, how they were incurred, and who inflicted them.

It is reasonable to assume that plaintiffs have chosen their path, knowing that the requested information would have revealed that many plaintiffs cannot establish liability or damages. Plaintiffs have apparently decided to stand or fall as a group, rather than present the specific information as ordered by the Court. Thus, those with potentially meritorious claims are dragged down with those whose claims should never have been brought. Should plaintiffs decide to take seriously their responsibility to specify their individual claims, they should be allowed, even now, to do so. However, in the absence of the specific information, which the Court has repeatedly told plaintiffs to provide, further prosecution of this case is unwarranted.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that defendants' supplemental motion to dismiss should be GRANTED. All of plaintiffs' personal injury claims should be DISMISSED under Rule 16(f) for failure to comply with the scheduling order, and plaintiffs' remaining claims, which are the property damage claims, should be DISMISSED under Rule 16(f) for failure to comply with the scheduling order, and under Rule 41(b) for failure to prosecute.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. *Such party shall file the objections with the clerk of the court, and* *serve the objections on all other parties and the magistrate judge.* A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *See Thomas v. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Services Automobile Association,* 79 F.3d 1413, 1428 (5th Cir. 1996).

SIGNED this 2nd day of February, 1998.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CRECENSIO ACUNA, et al	§ §	CIVIL CASE NO. SA 96 CA 0543
VS.	§ §	JURY TRIAL DEMANDED
BROWN & ROOT, INC., et al	§ §	

PLAINTIFFS' OBJECTIONS AND APPEAL OF MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Crecensio Acuna and all plaintiffs herein, by and through their attorney of record, and file these Objections and Appeal of the February 2, 1998, Memorandum and Recommendation of Magistrate Judge John W. Primomo, and would show this Honorable Court as follows:

I.

SUMMARY OF ARGUMENT

1. Although admitting that the scheduling order proposed by defendants was "atypical", on April 11, 1997, Magistrate Judge John W. Primomo entered an overly burdensome Scheduling Order. ***Exhibit A.*** Among other requisites, that Order required that by July 11, 1997, prior to any discovery or disclosure, plaintiffs produce affidavits from experts establishing *prima facie* causation

for approximately 1000 plaintiffs.[1] In compliance, plaintiffs filed those affidavits. ***Exhibit B.***

2. After a finding by the Magistrate Judge that the original affidavits were not sufficient, as validated by this Court, plaintiffs produced additional affidavits, from several experts, which affirmed existence of *prima facie* causation.[2] By any definition of analysis, with these affidavits, plaintiffs more than complied with the Magistrate Judge's requirement, first established in his April 11, 1997, Order, that plaintiffs establish *prima facie* causation. ***Exhibit C.***

II.

FACTUAL AND PROCEDURAL HISTORY

This is a civil action to recover damages for personal injuries to numerous plaintiffs due to uranium mining and associated activities in Karnes and surrounding counties. These plaintiffs, all poor and primarily hispanic, all reside in Karnes and surrounding counties.

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[1] That Scheduling Order also required plaintiffs to identify the precise chemicals and other compounds to which each plaintiff was exposed, the evidence validating defendants' egregious activities, events and conduct and the chemicals and compounds to which plaintiffs were exposed, even though that information was already in defendants' possession. By so burdening plaintiffs, defendants were absolved from any responsibility to produce documents through required disclosure or discovery.

[2] It is no more proper to impose such burden upon plaintiffs, without disclosure or discovery, than to impose upon each Defendant the obligation to establish a good-faith defense of showing non-use of the toxic substances, non-toxicity of the substances, non-exposure of any of the plaintiffs, and non-causal relationship.

On April 11, 1997, an Order proposed by defendants was entered by the Magistrate Judge, compelling plaintiffs to provide affidavits to establish *prima facie* for each plaintiff; in and of itself an inappropriate vehicle for resolving complex tort litigation. As additional complication, the September 16, 1997 Order placed an even more onerous burden upon plaintiffs. Still, plaintiffs complied with that Order by serving over 1000 original affidavits and then more than 400 supplemental affidavits, clearly establishing *prima facie* causation in compliance with the order from the Magistrate Judge.

Nevertheless, shortly thereafter, defendants then filed a motion to dismiss, or alternatively, to enforce scheduling order. Therein, defendants *did not* assert any failure to establish *prima facie* causation, but only sought more detail which is accessible through depositions and discovery.[3] Without benefit of hearing, by Order dated September 16, 1997, the Magistrate Judge Ordered plaintiffs to produce even more affidavits, and further expanded the quantity, scope, and contents of the required affidavits. In compliance, plaintiffs produced further affidavits, which conclusively established *prima facie* causation.

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[3] Defendants have full knowledge that plaintiffs damages are result of uranium mining and related operations, and are aware of the associated dangers and consequences. In fact, some related cases have already been settled by these same defendants.

In response to those affidavits, by Order dated September 16, 1997 Order, the Magistrate Judge invited defendants to submit a motion to dismiss after plaintiffs complied with the Order. ***Exhibit D.*** As expected, defendants followed that directive from the Magistrate Judge and in fact did submit another motion to dismiss. Although plaintiffs more than met the burden imposed upon them, without benefit of discovery or depositions, to establish *prima facie* causation, on February 2, 1998, the Magistrate Judge filed a Memorandum and Recommendation, which recommended dismissal of all claims. ***Exhibit D.***

III.

April 11, 1997 Order

The April 11, 1997 Order required *each* plaintiff to produce *an* affidavit from a "qualified" expert that specified: (1) illness and condition attributable to each plaintiff's exposure; (2) when and how such exposure occurred; (3) the substances each plaintiff was exposed to; (4) the source of such exposure; and (5) the scientific and medical basis for the expert's opinion. ***Exhibit A.*** As explained, such was required to compel plaintiffs to make a *prima facie* showing of causation; which has been done.[4]

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[4] In effect, that order required plaintiffs to provide information that may only be known to the defendants, related to the precise substances utilized in mining operations to which plaintiffs were exposed, as well as duration of such exposure. Plaintiffs certainly know that they were exposed to uranium mining operations, but do not have full knowledge of all the substances to which they were exposed nor durations of such

That Order required "an affidavit" for each plaintiff. Obviously, any singular affidavit for each plaintiff would have to include all of the five (5) separate requirements enumerated above, and would necessarily include facts, related to exposure levels, dosages and other facts, relied upon by the expert.

Notwithstanding, defendants initially complained that the affidavits: (1) were all made by Dr. C.F. Smith, a medical doctor, licensed to practice in Tennessee; (2) identified the materials and substances to which each plaintiff was exposed;[5] (3) did not specify the precise day and minute of exposure; (4) did not specify an exact location for exposure; and (4) did describe the pathways of exposure for each plaintiff.

A. Plaintiffs conformed to Order

As detailed in plaintiffs' previous response to defendants' motion to dismiss filed on August 5, 1997, and incorporated herein by reference, the affidavits submitted by plaintiffs clearly stated the dosages, location of exposure, types of chemicals and substances each plaintiff was

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exposure, nor the particular defendant that caused the particular exposure from each individual substance.

[5] Curiously, while admitting that a wealth of public information exists relating to the subject mining and milling operations and the toxic substances utilized and produced therein, defendants complain when these same toxins are listed in plaintiffs' affidavits, which certainly would indicate that Dr. Smith considered this information, along with a myriad of other materials, none of which were required to be put in the affidavit, but much of it listed anyway.

exposed to, the illness/injury which has resulted from the exposure and dosages, and the means of exposure.[6] Further, the affidavits clearly detailed the documents relied upon to establish causation. Certainly, these Affidavits meet both the letter and the intent of the Order from this Court. ***Exhibit C.***

B. Plaintiffs' experts

The Order required that each affidavit be prepared by an expert, and did not specify a particular type of expert (i.e. Ph.D., M.D., toxicologist, biologist, etc.), and did not require that plaintiffs utilize more than one expert, or provide more than one affidavit for each plaintiff. Absolutely nothing anywhere in the Order required that the expert be a treating physician licensed to practice medicine in Texas, or even that he or she be a physician at all.

Subsequently, defendants attacked the qualifications of plaintiffs' experts to render their opinions, a far cry from the original letter and intent of the Order issued from this Court. Specifically, defendants allege that Dr. Smith "in reality, is offering unsupported opinions far outside his alleged 'expertise'." Although such is not true, defendants now attempt to discredit Dr. Smith, and plaintiffs other experts, without any evidence or even substantial argument as support. Although defendants may assert Dr. Smith and plaintiffs' other experts are not qualified, what else would they be expected to assert.

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[6] As detailed herein, precise dosages and duration of exposure are impossible considering most of the plaintiffs lived in the area for years and were exposed over a long period of time. However, plaintiffs conclusively established each plaintiff had exposure to sufficient (minimum) dosage required to establish causation for each particular illness.

From those bold assertions, defendants continued to attack because plaintiffs' experts were all "in the medical field", and were critical that certain "types" of experts were not used, such as toxicologist, hydrogeologist etc. Again, defendants seek only to expand the scope of the Order from this Court and the burden on plaintiffs. There was no requirement for a particular type of expert to submit the affidavits, and for defendants now to attempt to dismiss the claims of these many plaintiffs based upon some fabricated requirement is criminal.

1. Dr. C.F. Smith, M.D.

Again, the Magistrate Judge's Order only required that each affidavit be prepared by an expert, and did not specify what particular type of expert (i.e. Ph.D., M.D., toxicologist, biologist, etc.). Further, the Order did not require that plaintiffs utilize more than one expert, or provide more than one affidavit for each plaintiff. Absolutely nothing anywhere in the order required that the expert be a treating physician licensed to practice medicine in Texas, or even that he or she be a physician at all.

Nevertheless, Dr. Smith is a duly licensed medical doctor and thus qualified. Dr. Smith rendered expert opinions based upon scientific data, tests, authorities and other information available to him. His opinions comply with the Order to establish causation.

2. Plaintiffs' other experts

Besides Dr. Smith, affidavits were submitted from: (1) Dr. William Au,[7] a professor and respected genetic-toxicologist from the University of Texas Medical School in Galveston; (2) Dr. Kenneth Ratajczak, a medical doctor and board certified radiologist; (3) Dr. Aristo Vojdani,[8] a Ph.D. in immunology and microbiology; and (4) Dr. Glen Baker, a medical doctor, board certified in internal medicine and pulmonology, a renowned expert in diagnosis of pulmonary diseases, including asbestosis, pneumoconiosis and other fibrotic conditions of the lung. For defendants to even imply that plaintiffs' experts were not qualified to render the opinions expressed is ridiculous, and most certainly beyond the scope of the requirements from this Court.

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[7] Defendants maliciously state that "Dr. Au's work is invalid . . . " Comparatively, Dr. Au is a world renowned expert and his peer reviewed, published article is anything but "invalid", even though his results were not what defendants' would have preferred. Based upon this same work identified as "invalid" defendants have already paid money to settle another lawsuit in Texas, based upon same or similar exposures and dosages and illnesses as the plaintiffs in this lawsuit.

[8] Defendants' attacks on Dr. Vojdani, and allegations that "similar testing [and testimony] by Vojdani was disallowed recently . . . by two federal courts," is slanderous and untrue. In reality, a federal district court in Nevada, in a lawsuit against the manufacturer of a defective brain shunt, determined that Vojdani's testing procedure and related testimony regarding a new and progressive "silicone antibody blood test", developed to detect the presence of silicone antibodies, did not meet the admissibility standard of ***Daubert***. ***Cabrera v. Cordis Corp.***, 945 F.Supp. 209 (D. Nev. 1996). Obviously, there is absolutely nothing at all "similar" about "silicone antibody blood tests" and Dr. Vojdani's diagnosis of immune system dysfunction in this case, and nothing to discredit Dr. Vojdani or his testimony here.

C. Causation

Although defendants asserted that "there was no real effort made by Dr. Smith to link illnesses or condition to particular plaintiffs," such assertion is categorically not true. In fact, each affidavit clearly stated the *particular* illnesses and conditions attributable to each plaintiff's exposure to the mining and milling operations; precisely as required by the Order. Such is in complete conformance with the requirements of the Order, and clearly establishes *prima facie* causation.

D. Time and duration of exposure

The mining and milling operations were conducted in Karnes County and surrounding counties for more than 40 years.[9] Most of the plaintiffs lived in these areas for their entire lives, some for the majority of the duration of the mining and milling operations. Many of the plaintiffs actually worked in the mines and milling operations for 20, 30 or more years. To specify the precise amount of exposure to each particular chemical or substance, or to specify the illnesses from *each* particular chemical or substance separately, is impossible and was not required by the Order.

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[9] Although the mining and milling operations were discontinued in the early 1990's, the individuals who lived in that area are still exposed today to by-products of the mining and milling operations retained in the soil and water.

Such interpretation of the requirements of the Order might be realistic if a plaintiff casually visited in the area for several hours, or even a finite number of days (e.g. vacationed with sister in Karnes County during the first week of August in 1968 and got exposure of "three teaspoons of arsenic"), but that is not the case with these plaintiffs. Each has lived for many years in the mining/milling operations area, and were continuously and systematically exposed to the compounds and substances utilized and produced in mining and milling operations, all specifically identified as required by the order. To quantify exposure in exact minutes, hours, or specific dates would be both unrealistic and insurmountable, and was not required.

In summary, the April 11, 1997 Order only required "plaintiffs to establish a prima facie case of causation." Plaintiffs were never required to put on their *entire* case with every comprehensively detailed fact, statement, literature, symptoms, piece of all expert opinions, or account for their whereabouts over forty years on each and every day, but were *only* required to meet a threshold test for the Court to see if a prima facie showing of a cause of action could be made.

IV.

September 16, 1997 Order

After Plaintiffs produced over 1000 affidavits, from a licensed medical doctor, the Magistrate Judge entered yet another order, ostensibly to compel "compliance" with the initial Scheduling Order. That Order stated that "Plaintiffs must establish a prima facie case of causation of their injuries . . . ", But, in fact the Order included arduous additional requirements, not contained in the Original order, all to be completed on or before October 31, 1997. Such requirements include:

(1) state with particularity the dosage of exposure as to each plaintiff;

(2) provide scientific and medical basis for each opinion regarding illnesses or conditions suffered by each plaintiff;

(3) name the specific tests conducted on each plaintiff, and indicate results of each test;

(4) provide employment information for each plaintiff exposed during employment;

(5) provide residence information for each plaintiff;

(6) specify time period (duration) of exposure;

(7) the specific dosage of exposure to each plaintiff; and

(8) specify how certain facilities/operations contributed to each injury.

As previously detailed, calculation of precise dosage and exposures are virtually impossible since most of the plaintiffs lived in and around the area for many years, some all of their life. In fact, because of the mining and milling operations, release of contaminants into the ground, water and environment, plaintiffs were exposed for years; essentially continually. To quantify this seems almost meaningless, and certainly unnecessarily burdensome on plaintiffs. Plaintiffs' affidavits conclusively established each plaintiffs' (minimum) exposure to sufficient (minimum) dosage required to establish causation for each particular illness. No more is required even under ***Daubert.***

V.

CONCLUSION

Although some plaintiffs worked in the uranium mines and mills, other plaintiffs were exposed to the products and by-products of mining and related operations. The orders entered by the Magistrate Judge imposed undue and improper burden upon plaintiffs. Still, plaintiffs substantially conformed with the requirements by providing more than sufficient evidence to establish *prima facie* causation. Certainly, dismissal of plaintiffs' claims would be manifestly unjust.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Objections and Appeal of Magistrate Judge's Order to District Court has been forwarded to all counsel of record on this the 17th day of Feb., 1998.

/s/ Bruce L. Jamison
BRUCE L. JAMISON

SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

§ 401.011. Radiation Control Agency

(a) The Texas Department of Health is the Texas Radiation Control Agency.

(b) The department shall exercise the powers and duties under this chapter for the protection of the occupational health and safety and the environment.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989.